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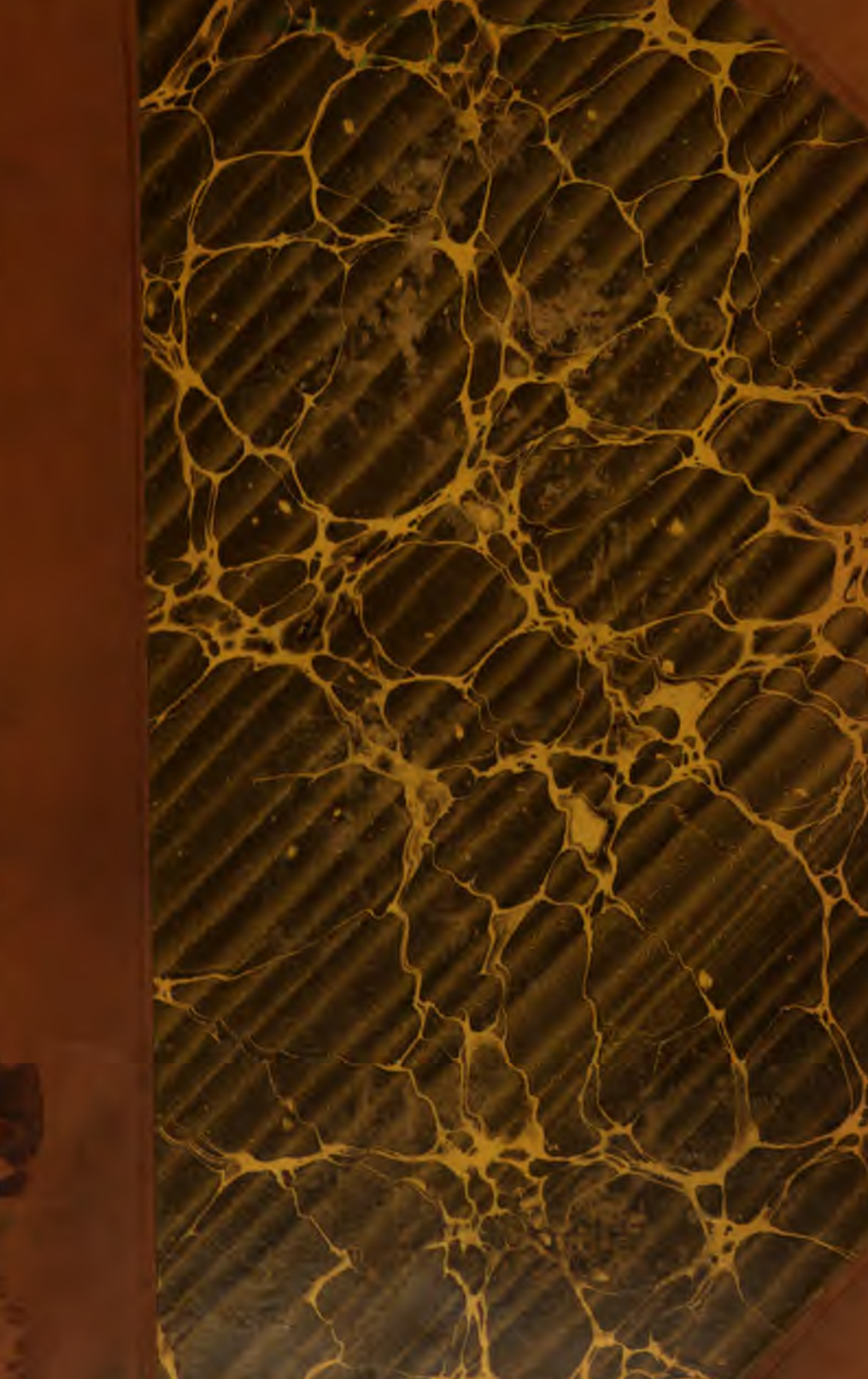
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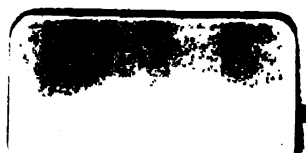
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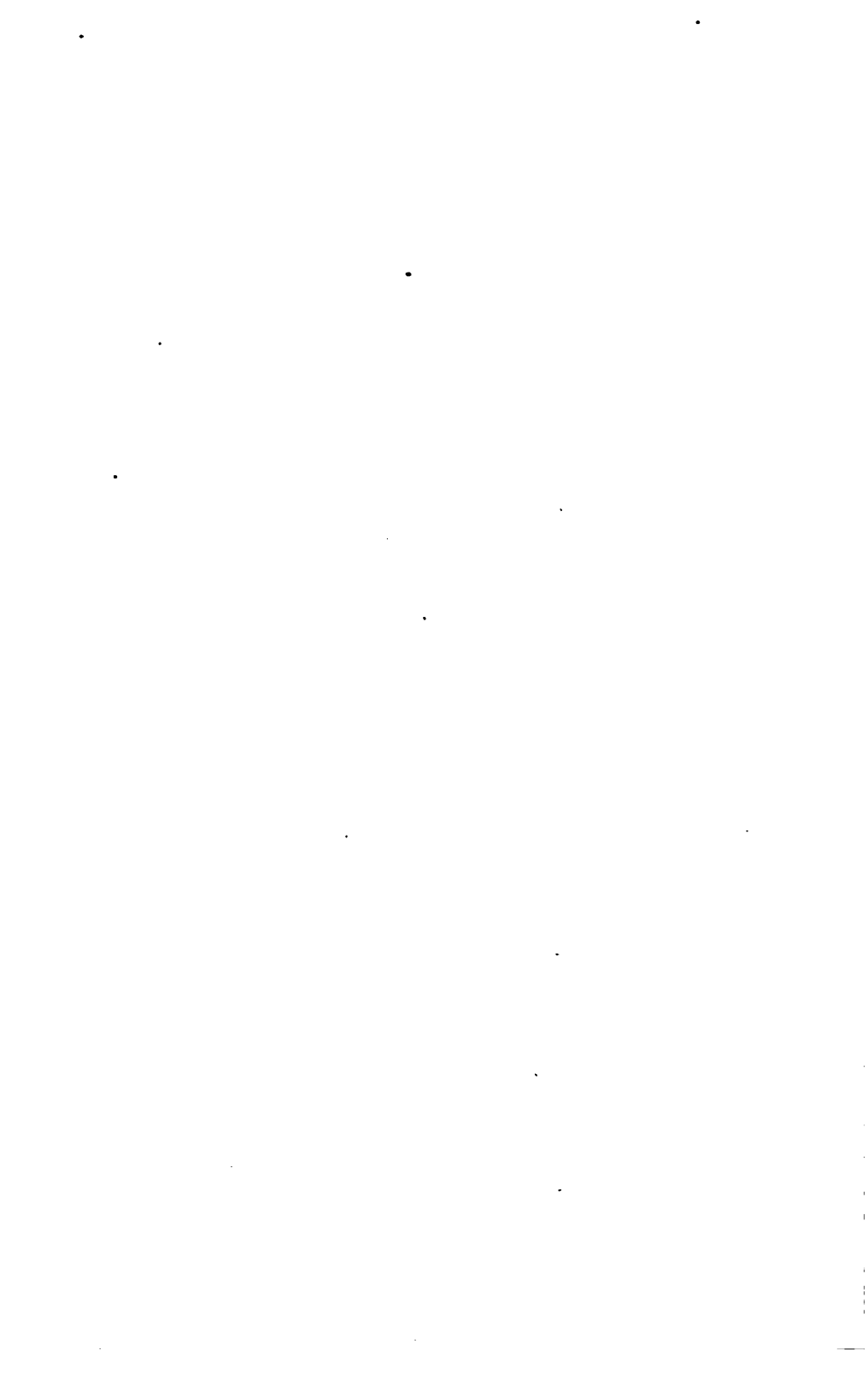
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LOWER-CANADA REPORTS.

DÉCISIONS DES TRIBUNAUX

DU
BAS - CANADA.

REDACTEURS: MM. LELIEVRE ET ANGERS.

COLLABORATEURS A MONTREAL: MM. BEAUDRY ET FLEET.

VOLUME II.

QUÉBEC :
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1852.

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LOWER-CANADA REPORTS.

DÉCISIONS DES TRIBUNAUX DU BAS-CANADA.

SUPERIOR COURT.—MONTREAL.

Before VANFELSON and MONDELET, Justices.

No. 255 { MURRAY, *ès qua*..... *Plaintiff*,
of { vs.
1851. { GORMAN,..... *Defendant*.

Held, that in an action brought by a Tutor to a Minor, it is essential that the declaration contain an allegation that the appointment of the said Tutor, or a memorial of such appointment, has been enregistered.

Jugé, que dans une action portée par un Tuteur à un Mineur, il est essentiel que la déclaration contienne un allégué, que l'acte de tutelle, ou un sommaire d'icelui, a été enregistre.

Judgment 27th May, 1851.

Action brought by a Tutor to a Minor, in his said quality, against the Defendant, as Testamentary Executor of the will of one Patrick O'Reilly, to render an account.

The declaration alleged the appointment of the Plaintiff as Tutor on the 25th April, 1848, but there was no allegation that the appointment had been enregistered.

The Defendant thereupon demurred, on the ground that the declaration contained no allegation either that the

appointment of the Plaintiff as Tutor, or a memorial of such appointment, had been enregistered in the manner prescribed by the 24th section of the Registry Ordinance.

The following is the Judgment : “ Considering that in and by the 24th section of the Ordinance 4 Vict. c. 30, no action can be brought or maintained in the Courts of this Country, in the name or on the part of any Tutor or Guardian to a Minor or Minors, until after a memorial of the appointment of such Tutor shall have been registered in the manner prescribed by the said Ordinance ; considering that it is essential that the registration of the appointment of such Tutor should be alleged in the said Tutor’s declaration, and namely, should have but hath not been so alleged in this cause : considering therefore, that the Plaintiff as such Tutor hath not shewn, in and by his said declaration, that he hath such right of action as aforesaid,—the Court maintains the said Defendant’s *défense en droit*, and doth dismiss the Plaintiff’s action with costs, saving to the Plaintiff his recourse as he may be advised.”

DRUMMOND and LORANGER, for Plaintiff.

DAY, for Defendant.

BANC DE LA REINE, } DISTRICT DE MONTRÉAL.
EN APPEL.

Présents : ROLLAND, PANET et AYLWIN, Juges.

1851. { WILSON..... *Appelant*,
et
{ ATKINSON,..... *Intimé*. (1),

Jugé, qu'il n'est pas nécessaire d'enregistrer un contrat de vente postérieur à la mise en force de l'Ordonnance 4^e Vict. ch. 30, pour conserver au vendeur son privilège de Bailleur de Fonds.

Held, that the registration of a deed of sale subsequent to the coming into force of the Ordinance 4 Vict. ch. 30, is not required to preserve the privilege of *Bailleur de Fonds*.

Jugement le 11 octobre, 1851.

Il s'agissait en cette cause d'une contestation sur un ordre de collocation. L'Intimé, (Bailleur de Fonds de l'immeuble dont le prix était à distribuer,) sur une vente d'icelui faite sous seing privé en date du 7 décembre 1844, était par le Rapport du Greffier, colloqué par préférence à l'Opposant, créancier hypothécaire, qui avait fait inscrire son hypothèque au Bureau d'Enregistrement. Ce dernier contesta l'ordre, et la Cour Supérieure, à Québec, le 14 octobre 1850, prononça le jugement qui suit :

" Seeing that the said claim of the said Atkinson, is a
" privileged claim for the price of real estate sold subsequently
" to the coming into effect of the Provincial Ordinance 4 Vic.
" ch. 30 ; considering that for the effectual registration of
" any class of privileged claims, it is essentially necessary
" that a time should be limited within which such claims, if
" registered, should have full force and effect ; considering
" that the Legislature have not limited any time for the
" registration of the privileged claims of vendors of real estate,
" resulting from deeds of sale executed after the coming into

(1) Cette cause est la même que celle rapportée au 1 Vol. des Décisions des T. du B. C., p. 5, sous le nom de Shaw et Lefurgy.

“ effect of the said Provincial Ordinance, and therefore that
 “ it cannot be presumed that the Legislature intended the last
 “ mentioned class of privileged claims should be subject to
 “ the formality of registration, or that the holders of the last
 “ mentioned class of privileged claims should be exposed to
 “ the loss of those claims for the inobservance of a formality,
 “ for the observance of which the law has not afforded any
 “ effectual means, doth dismiss the contestation, &c.”

. Cette décision, soumise à la Cour d'Appel, y fut maintenue par la majorité de la Cour (AYLWIN, Juge, *dissentiente*) sauf quelque différence dans les considérants. Voici les termes du jugement de la Cour du Banc de la Reine :

“ The Court, &c., considering that the Vendor's privilege,
 “ as claimed in the present case, is based on a right of quasi
 “ retention, which by law secures to him the payment of the
 “ price, which right as *bailleur de fonds*, recognized by former
 “ Jurisprudence, is not affected by the Ordinance invoked
 “ against him, and that a different interpretation from that of
 “ the Court below, would be prejudicial beyond the intention
 “ of the law, as it would expose the Vendor to the loss of his
 “ privilege, which the law evidently purports to recognize :
 “ It is hereby adjudged that the Judgment appealed from,
 “ to wit, the Judgment rendered in this cause by the Superior
 “ Court of Lower Canada, on the fourteenth day of
 “ October, one thousand eight hundred and fifty, in the City
 “ of Quebec, be and the same is hereby affirmed with
 “ costs (2).”

ROSS et McCORD, pour l'Appelant.

STUART et VANNOVOUS, pour l'Intimé.

(2) See L. C. Reports, Vol. 1, p. 5.

By referring to the first volume of the Lower Canada Reports, p. 5, it will be seen that the judgment of the Court below was concurred in by Chief Justice BOWEN and Mr. Justice MEREDITH, (Mr. Justice DUVAL dissenting.) So that in each Court, the judgment, in this important matter, was rendered by two against one. The Chief Justice of the Province, Sir JAMES STUART, Baronet,

COUR SUPÉRIEURE.—QUÉBEC.

Présents : BOWEN, Juge-en-Chef, et DUVAL, Juge.

No. 878 { BROCHU,.....Demandeur,
 de { VS.
 1851. { FITZBACK et AL., Défendeurs.

L'acquéreur d'un Immeuble, qui n'a
 eu ni la tradition ni la possession, ne peut
 porter l'action pétitoire.

The purchaser of an Immoveable
 property, who has neither had seizin nor
 possession, cannot maintain the petitory
 action.

Jugement le 29 décembre, 1851.

Le Demandeur avait porté l'action pétitoire contre les
 Défendeurs. Il alléguait dans son action être le légitime
 propriétaire d'un lot de terre situé dans la seigneurie Pachot,

has not yet been called upon judicially to give his opinion upon this point. In the Circuit Court of Kamouraska, Mr. TASCHEREAU, Circuit Judge, adopted the opinion of the dissenting Judges, (DUVAL and AYLWIN,) and dismissed an hypothecary action by a Vendor or *Bailleur de Fonds*, because his title, (subsequent to the Ord. 4, V. C. 30,) had not been registered; but that judgment was subsequently reversed upon an appeal to the Superior Court, at Quebec, by Chief Justice BOWEN and Mr. Justice MEREDITH. (1) The Members of the Superior Court sitting at Montreal, or at least the majority of them, concur in the opinion entertained by the majority of the members of the Superior Court, at Quebec, and there the question is, now, no more allowed to be mooted. In favor of this doctrine, will also be found, in the 3. V. of la *Revue de Légis.* p. 56, a judgment rendered at Three Rivers, in October, 1847, in a cause No. 412, Heaven, a Bankrupt, Patton, Appellant, and Buchanan, Respondent, by the late Mr. Justice BEDARD, Mr. Justice MONDELET, D., and Mr. Justice GAIRDNER. Nevertheless, it must be said that this is still a vexed question, and one requiring perhaps the intervention of the Legislature. It embraces a large number of cases, wherein the publicity of a privilege is dispensed with. It is true that in France the Courts and the Commentators have given the same interpretation to the Art. 2106, of the Code, which is, in that respect, similar to our Provincial Ordinance. It is but right, that a Vendor should have a reasonable delay to register, and it would be unfair, that a mortgage or hypothec, created by the Purchaser, and inscribed at the moment of the purchase, should deprive the Vendor of his privilege; but there seems to be no legitimate reason for giving him an indefinite delay to register, and to allow him to keep secret his privilege, as long as he wishes, when such demur cannot be but the result of neglect or bad faith. The policy of the law in this respect has been much questioned, in France, by writers of the highest authority.

(1) Pepin, Applt. and Routier, Respt., No. 482 of 1851, S. C. Q.—Judgment 5th June, 1851.

en vertu d'un titre de concession qui lui en avait été consenti le 9 août, 1848, par les Dames Drapeau, propriétaires de cette seigneurie ; et que dès avant la passation de ce titre, il avait eu la possession de ce lot depuis l'année 1838, jusqu'au mois de mai, 1847 ; enfin, qu'en vertu de son contrat de concession, il avait voulu prendre possession de ce lot, mais en avait été empêché par les Défendeurs, qui le détenaient injustement : les conclusions étaient les conclusions ordinaires de l'action. A cette action les Défendeurs plaidèrent, entre autres moyens, que le Demandeur n'avait jamais eu la tradition et possession de l'immeuble en contestation, et que conséquemment il ne pouvait porter l'action pétitoire.

La preuve établit qu'en effet le Demandeur n'avait jamais eu la possession légale de cet immeuble, si ce n'est une occupation passagère et sans titre plusieurs années auparavant. Quant à la propriété et à la possession dans les seigneurs, auteurs du Demandeur, elles étaient prouvées d'une manière incontestable. Le Demandeur cita " Bowen et Ayre, R. de Légis. Vol. 2, p. 102.—et Stuart et Ives, L. C. Rep. p. 193.

La Cour renvoya l'action du Demandeur, sur le principe qu'il n'avait jamais eu tradition de l'immeuble réclamé.

Le jugement est comme suit :

La Cour considérant que lors de la concession faite au Demandeur par les héritiers Drapeau, le 9 août, 1848, le lot réclamé était et avait été pendant plusieurs années en la possession des Défendeurs ; et considérant que le Demandeur n'a pas obtenu des héritiers Drapeau, tradition du dit emplacement, et que la simple convention contenue dans le dit contrat de concession, non suivi de tradition, n'a pu transférer au Demandeur le domaine de propriété du dit lot,

et qu'à raison de ce défaut de tradition le Demandeur n'était pas propriétaire du dit lot, au temps de l'institution de l'action, déboute le Demandeur de son action. (1)

CASAUULT et LANGLOIS, pour le Demandeur.

PERRAULT, pour le Défendeur.

SUPERIOR COURT.—MONTREAL.

Before DAY and MONDELET, Justices.

No. 1016 { BURROUGHS, *Ex parte*,
of { and
1851. { DIVERS, *Opposants*.

Held, that a contestation to separate and distinct items of collocation in a report of distribution, interesting different parties, cannot be raised in one and the same paper, and that copies must be served on the parties whose claims are contested : the eight days within which a contestation is required to be filed are not juridical days.

Jugé, que la contestation d'un rapport de distribution, quant à des items distincts et séparés ayant rapport à différentes parties, ne peut être faite par une seule et même contestation, et que copies de telle contestation doivent être signifiées aux parties dont les réclamations sont contestées : les huit jours dans lesquels une contestation doit être filée ne sont pas huit jours juridiques.

Judgment the 21st October, 1851.

In this case, a motion was made to reject a contestation, filed by a party named Laframboise, to a Report of distribution, on the grounds that the said contestation, in one and the same paper, raised a contestation to three separate and distinct

(1) Les autorités suivantes furent citées par DUVAL, Juge :
Pothier, T., de la Propriété, No. 245.—Pothier, Obl. No. 152.—Troplong, Vente, No. 38.—Toullier, 4 V. No. 55.—Merlin, Rép. Vbo. Tradition.—Duranton, 10 Vol., No. 425.—Idem, 4 V. No. 226.—Fonmaur, L. et V. No. 627.—Pothier, Vente, Nos. 318, 319, 62, 320.—Q. B. R. Guty vs. Valin.

items of collocation, interesting three distinct and different parties; and that the said contestation had not been served upon any of the parties whose collocations had been contested, and particularly the party moving.

At the argument, stress was laid by the counsel for the contesting party on the fact that whereas the Rules of practice for the District of Three-Rivers and St. Francis specially require a copy of the contestation to be served on the interested party, no such proceeding is required by the general Rules of practice, which are silent on the point.

Both grounds were maintained, and the motion granted, the Court observing that these contestations must be served.

In the same case, a motion was made to reject a contestation filed by Jacob Dewitt, on the ground that it had been filed, on the ninth day after the posting up of the report in the Prothonotary's Office, the Rule of practice requiring that it should be filed on or before the expiration of eight days.

It was contended, *contra*, that the days intended by the Rule of practice were juridical days, and that one day being a Sunday, the delay did not expire till the ninth day, when the contestation was properly filed.

The Court granted the motion, observing that the Rule of practice did not say juridical days.

BURROUGHS, for Opposant ;
LAFRENAYE, for Laframboise, and
CHERRIER & DORION, for Jacob Dewitt.

IN THE SUPERIOR COURT.

Before SMITH, VANFELSON and MONDELET, Justices.

No. 1284 { CLARKE, *Plaintiff*,
 of { vs.
 1851. { CLARKE & AL, *Defendants*.

Held, that the certificate of a Notary, as to the state of mind of a party at the time of making her will, that she was *saine d'entendement*, is mere matter of style, and may be contradicted by parol evidence ; the Notary is not bound to write the original or minute of the same with his own hand.

Jugé, que le certificat d'un Notaire, quant à l'état mental d'une personne à l'instant où elle fait son testament, qu'elle était saine d'entendement, est purement de style, et que cet énoncé peut être contredit par témoignage verbal : le Notaire qui exécute un testament n'est pas tenu d'écrire l'original ou la minute de tel testament de sa propre main.

Judgment 13th October, 1851.

This case came before the Court upon a motion to revise a ruling given at the *Enquête*.

The action was brought to set aside a Will on the ground of suggestion, and as being made by the testatrix at a time when she was not *saine d'entendement*.

At the *Enquête*, the two Notaries by whom the Will was executed were brought up by the Plaintiff, and questions put to them as to the state of mind of the testatrix at the time of making her will—whether she was assisted by any and what papers or writings,—and as to who wrote the original or minute of the will. These questions were objected to, and the objection maintained by the presiding Judge.

McKAY, for Plaintiff.

The words "*saine d'entendement*," which the Notaries have used in the Will, are merely technical, *de style*, and may

be disproved by parol evidence ; the Ordinance of 1667 does not exclude Notaries from being witnesses ; by the question, " Who wrote the Original of the Will ? " the Plaintiff does not attack any declaration of the Notaries ; the law does not require either of the Notaries to write the will : according to the best authorities, where fraud is alleged, or, as in this case, fraud and suggestion, a great latitude is allowed, and even Notaries may be examined as witnesses. (1) .

Cross, *contra*.

SMITH, Justice :—One proposition in this case is, whether the certificate of a Notary as to the state of mind of a party, can be contradicted by parol evidence. The Court is of opinion that it can. Then, if evidence is admissible on this fact, the question comes up, are the Notaries themselves competent as witnesses ? This question will be found fully discussed in 9 Toullier, Nos. 312, 313. From the time of Danty, up to the time of Toullier, the declaration of the Notaries as to the state of mind of a party was regarded as mere matter of style, and susceptible of being disproved by verbal evidence. All the authorities concur on this point. It is true that the Chancellor d'Aguesseau, took a different view, based on what he supposed to be public policy, but Toullier has taken up the arguments of the Chancellor, and conclusively shewn them to be unfounded. The Rule as established by Toullier, Merlin, and other Jurists is, that Notaries are competent to give evidence where what they testify does not fall within the scope of what they are bound to do by law. Here they were not bound by law to make the declaration in the will touching the sanity of the testatrix, nor were they, nor either of them, bound actually to write the original will, and the Judgment pronounced at *Enquête*, must be over-ruled.

(1) Denisart, *verbo* Notaire.—9 Toullier, Nos. 312 et 313.—Article 289, Custom of Paris ; Pothier, *Donations Testis*.

VANFELSON and MONDELET, Justices, concurred, the latter remarking that the result of a close examination of the authorities, had led him to change the opinions formerly expressed by him in this case at the *Enquête*.

McKAY, of Counsel for Plaintiff.

CROSS, Attorney, for Defendants.

SUPERIOR COURT.—MONTREAL.

Before SMITH, VANFELSON and MONDELET, Justices.

No. 434 { MONK et AL, *Plaintiffs*.
of { vs.
1851. { VIGER, *Defendant*.

<p>Held, that under the Act 13 & 14 Vict., ch. 37, sec. 15, Advocates, not practising, are not liable to the tax thereby imposed for paying reporters.</p>	<p>Jugé, que sous l'acte de la 13 et 14 Vict., chap. 37, les Avocats qui ne pratiquent pas, ne sont pas tenus au paiement de la taxe imposée par cet Acte, pour la rétribution des rapporteurs.</p>
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Judgment 17th December, 1851.

This cause was evoked from the Circuit Court. The Defendant who was formerly an Advocate practising in the district of Montreal, had been sued by the Plaintiffs, Prothonotaries of the Superior Court for Lower Canada, in the district of Montreal, for the sum of £1 5 0, alleged to have been due by the Defendant under the 15th sect. of the Act 13 & 14 Vict., ch. 37, which enacts "that in aid of the compilation and publication of the decisions of the Tribunaux in Lower Canada, each of the persons hereinafter designated and residing in any of the districts above mentioned, shall

pay in each year, between the 1st October and the 31st December, to the Prothonotary or Clerk of the Superior Court, in the district in which he shall reside, the sum of £1 5 0 currency, to wit: 1st the Judges and Prothonotaries or Clerks of the Court of Queen's Bench, the Superior Court, and the Circuit Court: 2, the Advocates and Attorneys: 3, the Sheriffs: 4, the Clerks of the Peace," &c. &c. &c. with power to the Prothonotary to sue for the same, and in default of payment within two months after judgment, then the Advocate in default to cease to enjoy the right of practising his profession, in any of the Courts of Law in Lower Canada, until he shall have satisfied the same."

The Defendant pleaded, that he had for a long time, and even previously to the year 1828, ceased to practise at the Bar: that during a part of that time he had been absent from the Province on public business: that since then he had been a member of the Executive and Legislative Councils, and had acted as a Justice of the Peace at the Quarter Sessions: that in consequence of these different duties and offices, (*charges*) he had become incapacitated from practising as an Advocate and Attorney, and had not practised as such since 1838, and could not be rendered liable to a tax the very nature of which supposed, in those who were subjected to it, the actual exercise of the duties of the profession.

To this plea, the Plaintiffs demurred, and the cause came up for hearing on the demurrer.

CHEIRIER, Q. C., for Defendant: All the difficulty turns on the meaning to be attached to the word Advocate used in the Act. I contend that by Advocates are to be understood those only who actually practice their profession. This distinction is founded in reason. When we speak of a merchant, we refer to those who are actually engaged in mercantile pursuits. This distinction between an Advocate practising and a non-

practising Advocate is recognised by the French law writers (1):

This also is the view taken by the Provincial Statute, 6 Vict: ch: 3, sec. 2, which enacts that no Solicitor, Attorney, or Proctor, shall be capable of being a Justice of the Peace during the time he continues to practice. The injustice of taxing parties who have long since abandoned the law for other professions, is too apparent, and could never have been the intention of the Legislature.

GUGY, *contra*.

The Court in rendering Judgment, dismissing the demurrer, referred to the proviso of the 15th section of the Act 13th and 14th Vict: ch: 37, by which parties in default of paying the tax within two months after Judgment rendered against them, are made incapable of exercising their profession, it was observed that this made it evident that it was the exercise of the profession—*l'état d'Avocat*—which was taxed, and not the mere name attached to the profession.

Demurrer dismissed.

GUGY and PHILLIPS, for Plaintiffs.

CHEBRIER, DORION and DORION, for Defendant.

(1) Denisart, *verbo*, Avocat, § 1 et 2, p. 1608.—Merlin, *verbo*, Avocat § 10, n. 7, p. 285.

to recover the sum of £500 for printing and publishing notices and official advertisements in the Quebec Gazette by authority.

The Defendants pleaded, in effect, that, in their capacity of Sheriff, they were bound to cause all notifications and advertisements respecting sales of real estate, to be printed and published in the Quebec Gazette by authority, and that the Queen's Printer was bound and obliged to print and publish therein all such notifications and advertisements during the period required by law : that in the present instance, the advertisements for the price of which they were sued, were such advertisements as they were bound by law to insert in the Official Gazette ; and as the Queen's Printer was bound to print and publish, and that they in nowise contracted with or employed him, the Queen's Printer, as touching the same, but that the same was, in fact, done by the Queen's Printer in performance of his official obligations, and not for the use or benefit of the Defendants, but solely for the use and benefit of the parties to the causes wherein such sales were to take place, and who were alone liable to pay therefore : that they had paid over to the Plaintiff, on account of his fees for the insertion of the said advertisements, the sum of £83 2 6, and that since the institution of the present action there had come into their hands, on account of the same, a further sum of £96 3 3, which they had always been willing to pay over to the Plaintiffs : that, making deduction of these two amounts, there still remained due a balance of £135 14 8, which had never come into their hands, and which they were not liable to pay.

To this Plea the Plaintiffs filed a General Answer, and admissions having been given, the parties were heard on the merits.

DAY, Justice, in rendering judgment, observed : At the argument of this case it was suggested, that the Sheriff acted

in these matters merely as the *huissier* acted in France, as the *mandataire* of the parties to the causes wherein the sales took place, who are substantially the debtors, and to whom the Printer must look. On looking into the whole of the proceedings by which land is brought to sale in this country, however, and comparing them with the system in France, it is plain that there is no analogy between the two, and that we must look to our own Statute Law for the general reasons which govern this case. By the Ordinance 25 Geo. III, c. 2, sec. 23, the mode is pointed out by which the Sheriff is to proceed to sell lands taken in execution, and the duties, there made imperative on the Sheriff, include the advertising of the property. This would seem to make it a contract between the Sheriff and the Printer, since the Sheriff could alone call on the Printer to perform that duty. But on referring to the Statute 6 Will. IV, c. 15, s. 25, we find the law stated in very clear terms, it being declared that the Sheriff, on the receipt of any writ of *fieri facias de terris, venditioni exponas*, or *alias* writ of *fieri facias*, is entitled to demand from the person presenting the same the sum of 20s. in advance, to defray the expenses of publication. This shows the intention of the Legislature to make the Sheriff liable. Moreover the universal practice of the Sheriff indicates that the contract is between him and the Printer, as he has always, after deducting the sum from the amount levied, put it among his own particular charges. If the law were not so, great injustice, as well as inconvenience, might result, as the Sheriff has the means to cover himself from loss, whereas the Printer has none : there is no privity of contract between the Printer and the Plaintiff, and if the law were to deny the Printer a remedy against the Sheriff, it would deny him all remedy whatever. It is true that this may seem hard on the Sheriff, but it is one of the contingencies of his office, and he must look to the Legislature to relieve him from it.

Judgment for Plaintiff for balance sought to be recovered.

ROSE & MONK for Plaintiff.

BETHUNE & DUNKIN for Defendant.

SUPERIOR COURT.—MONTREAL.

Present : DAY, SMITH, and VANFELSON, Justices.

No. 2674	{	THE SOLICITOR GENERAL, pro Regina, <i>Informant</i> ,
		vs.
of	{	TWO CASKS OF PLANES, &c.,
		and
1851.	{	DARLING & AL.,..... <i>Claimants</i> .

Held, that in an information at the suit of the Crown, the allegation that the goods sought to be forfeited, had been seized as having been imported into the Province without the duties being paid, &c., is insufficient, and that there must be a substantive allegation that they were imported, and brought in, in violation of the Custom House regulations : also, that the omission of the words " against the form of the Statute," &c., is fatal.

Jugé, que dans une information à la poursuite de la Couronne, l'allégué que les effets que l'on veut faire déclarer confisqués, ont été saisis comme importés en cette Province sans que les droits aient été payés, etc., est insuffisant, et qu'il doit y avoir un allégué spécial, que tels effets ont été importés en contravention aux règlements des Douanes : aussi, que l'omission des mots " contre la forme du Statut," etc., est fatale.

Judgment the 14th October, 1851.

This was an Information on the part of the Crown, to cause two casks of planes, &c., seized by the Customs Officers, for an infraction of the Revenue Laws, to be condemned, the goods having been imported without the payment of duties.

The information was in the following form :—

" Be it remembered that Lewis T. Drummond, Esquire, Solicitor General of our Sovereign Lady the Queen, in and

for that part of the Province of Canada which formerly constituted the Province of Lower Canada, who, for our said Sovereign Lady the Queen in this behalf, prosecuteth, in his proper person, cometh here, into the Court of our said Sovereign Lady the Queen, before the Honorable the Chief Justice and Justices of the said Court of Queen's Bench, in and for the District of Montreal, and giveth the Court here to understand and be informed, that Robert Hart Hamilton, of the City of Montreal, in the District of Montreal aforesaid, then being one of the Officers of the Customs of our said Sovereign Lady the Queen, in and for the said Province of Canada, to wit, Landing Surveyor for the port of Montreal, between the first day of May in the year of our Lord 1848, and the day of exhibiting this information, to wit, on the 17th June in the said year 1848, at the City of Montreal aforesaid, did, in pursuance of the Statute in such case made and provided, seize and arrest, to the use of Her said Majesty, as forfeited, two casks, to wit (here follows a description of the casks and their contents), of the goods and chattels of some person or persons unknown to the said Robert Hart Hamilton : for that the said two casks containing, &c., &c , were, within the time aforesaid, to wit, on or about the twelfth day of June in the year 1848, imported and conveyed into this Province, and landed and taken beyond the port of entry, to wit, beyond the said port of Montreal, without the duties thereon, by law chargeable, having been paid, without any warrant for the landing of the same first, in that behalf, in due course of law, had and obtained, and without any due entry thereof having been made as required by the Statute in such case made and provided. By reason whereof the said two casks containing, &c., &c., have become and are forfeited. Whereupon the said Solicitor General prayeth the consideration of the Court here in the premises, and that the said two casks, &c., may be adjudged

and condemned as forfeited, in pursuance of the Statute in such case made and provided.”

The goods having been claimed by Messrs. C. & D. Darling, Merchants, of Montreal, the Importers, those parties appeared, and pleaded—1st. A demurrer, on the following grounds :

1. Because it is not alleged from what place the goods, alleged to have been unlawfully imported, were brought, whether seawise or otherwise, or how, and in what manner the same were imported.

2. Because it is not alleged, nor does it appear, that the said Information is brought on any Statute, or that the goods alleged to be forfeited, are so forfeited for any cause or act committed contrary to any Statute, and because the pretended offence is not alleged to have been committed contrary to any Statute in such case made and provided.

3. Because it does not appear whether the pretended seizure, mentioned in the said Information, was made by reason of the non-entry of the said goods, or for non-payment of the pretended duties on the said goods, or for not obtaining a warrant for the landing of the said goods, and because the said Information is bad for duplicity.

4. Because it is not sufficiently alleged, that any, or, if any, what duties were chargeable on the said goods.

5. Because the allegations contained in the said Information are wholly insufficient to warrant the conclusions thereon taken.

It is unnecessary to refer to the other pleadings, as the Information was dismissed on the demurrer.

ROSE, for Claimants: There is no averment of any illegal importation, but merely that the goods were seized “as being

forfeited," and even this is imperfect, since the averment relates to the casks and not to their contents—the contents being referred to only as descriptive of the packages. But on principle, the Information is defective. The substantive offence should be alleged to have been committed contrary to the Statute, and the Crown should have averred that duties were payable in respect of the goods—that they were unladen at Montreal as the proper Port of Entry—that they were carried beyond the Custom House without the duties being paid or any entry made, and all this should have been averred to be against the form of the Statute. The authorities in support of this are uniform and numerous (1). Now by a grammatical construction of the Information, all the assumed causes of forfeiture are stated merely as reasons for the seizure,—the expressions "for that whereas" connecting the subsequent matter merely with the circumstance of the seizure.

Besides it is not even averred that there were any duties payable on the goods, nor does it appear but that the Importers meant to enter them at some port west of Montreal. The words of the Statute are "*carried past* the Port of Entry without being examined by the proper officer," while the averment in the Information is only that they were "*taken beyond* the Port of Montreal, without &c.," the latter words being by no means synonymous with the former.

The Information merely complains *negatively* of the nonperformance of an act required by the Statute, without averring the *commission* of the act forbidden by the Statute, which alone entails the penalty. (2)

LORANGER *contra*.

(1) Croke's Eliz, p. 751, Dingley vs. Moor:—Salkeld 212:—7 East 516, Clanricard vs. Stokes:—2 East 339 and 341:—Espinasse on Penal Statutes, p. 107 and 110.

(2) 8 Jurist, part 2, p. 199:—12 Meeson and Welsby, p. 640. Attorney General vs. Clerk.

DAY, Justice :—Informations at the suit of the Crown are, to all intents, proceedings of a criminal nature, and recourse must be had to the English Authorities for the necessary formalities. Now in England it is indispensable that there should be a substantive declaration of the acts constituting the illegal offence. It is not sufficient to allege that the goods were seized, but there must be a substantive allegation that they were imported, and brought in, in violation of the Custom House regulations. There is nothing on the face of this Information to show that an illegal act has been committed. The omission of the words “against the form of the Statute in that case made and provided” has also been held to be fatal. The reason is that at Common Law the importation is an innocent act, and the offence being created by statute, the words “against, &c.,” are sacramental. (1)

On these grounds the demurrer must be sustained, and the Information dismissed.

The following is the Judgment.

“ Considering that the Information doth not set forth, by any direct and substantive allegation, that the goods therein mentioned were brought or imported into this Province and carried past any Custom House, or were unladen from any vessel arriving from any place out of this Province, without the requirements of the Statute, in such case made and provided, having been complied with, and against the form of such Statute, or contain any other direct and substantive allegations by reason whereof, and by law, the said goods ought to be forfeited in manner and form as the Informant hath concluded and prayed ; The Court maintaining the

(1) *Espinasse's pleadings*, p. 107 :—1 *Chitty's Pleadings*, pp. 405 and 406.

said *défense au fonds en droit*, or demurrer, of the said Claimants, doth dismiss the said Information."

THE SOLICITOR GENERAL, for the Crown.

ROSE & MONK, for the Claimants.

SUPERIOR COURT.—MONTREAL.

Before DAY, VANFELSON and MONDELET, Justices.

No. 2267	{	ARCHAMBAULT,..... <i>Plaintiff</i> ,
		vs.
of	{	ROY DIT PICOTTE,..... <i>Defendant</i> ,
		and
1851.	{	POIRIER et AL..... <i>Opposants</i> .

Held, that a typographical or clerical error in the english text of a Statute, by the insertion of the word "these" instead of the word "third," cannot be corrected by a reference to the french text, in which no such error occurs, and that the Court will not presume what meaning the Legislature intended, but will take the text as it finds it.

Jugé, qu'une erreur cléricale ou typographique dans le texte anglais d'un Statut, par la substitution du mot "these" pour le mot "third," ne peut être corrigée en référant à la version française, dans laquelle l'erreur n'existe pas, et que la Cour ne présumera pas quelle a été l'intention de la Législature, mais prendra le texte tel qu'il se trouve.

Judgment 30th December 1851.

This was an opposition *afin de charge* to a Writ *de terris*, filed on the part of the wife of the Defendant, *commune en biens* with her husband, claiming that the land seized should be sold subject to a right of usufruct in her favor, created by marriage contract, under date of the 25th November, 1837, by which a mutual donation was made between the parties of such usufruct to the survivor: The opposition alleged the enregistration of the marriage contract in the Registry Office for the County of Leinster, in which the land seized

was situated, but did not allege that it had ever been insinuated.

The Plaintiff contested the opposition on the ground, that inasmuch as the contract of marriage contained a donation *inter vivos*, it ought to have been *insinué au greffe*, and that the enregistration, in the County of Leinster, was not equivalent to and would not supply the want of insinuation, issue having been joined, the cause was set down on the *Rôle de Droit*, and the parties afterwards heard.

On the 2nd December, DAY, Justice, drew the attention of the Counsel in the cause to the Statute 14th and 15th Vict. ch. 93 sec. 4, intituled, "An Act to explain and amend the law, relating to the registration of Deeds in Lower Canada," which, he said, had completely changed the judgment the Court had been prepared to give. By this Statute the Legislature had settled the whole question. As this Statute, however, was a new discovery—no older than the day before—the Court would send the case down for re-hearing, in case the gentlemen engaged chose to be heard again.

The following is the clause referred to: "And be it enacted, That any and every donation or deed of gift *inter vivos* of goods and chattels, liable to registration or insinuation, or of lands and tenements, or real or immoveable property in Lower Canada, made either before or after the passing of the said Ordinance, shall be held and deemed to be and to have been well and sufficiently registered or *insinué*, provided the same have been or shall hereafter be registered either by memorial or at full length in the Registry Office in, and of, and for the District, or County, or Registration District, or Registration Division, as the case may be, in which the lands and tenements, real and immoveable estates thereby given or affected, were or may be situate: or

if no lands or tenements, real or immoveable estates be thereby given or affected, then in the Registry Office, in, of, and for the District or County, or Registration District or Registration Division, as the case may be, in which the donor is described in such donation or deed of gift, *inter vivos*, as being resident at the time of the execution thereof; or if the lands and tenements, real and immoveable estates thereby given or affected, were or shall be situate in two or more Districts or Counties, Registration Districts or Registration Divisions, then in the Registry Office in, of, and for each of such Districts or Counties, or Registration Districts or Registration Divisions: provided always, that in this latter case, the registration of any such donation or deed of gift, *inter vivos*, in the Registry Office or Registry offices, in, of, and for any one or more of such Districts or Counties, or Registration Districts or Registration Divisions, shall be held and deemed to be and to have been good and valid, and effectual so far as respects any lands and tenements, real and immoveable estates thereby given or affected, which may have been or may be situate in such District or County, or Registration District or Registration Division, although the same may be null and void for want of registration as to lands and tenements, real and immoveable estates situate in another District or County, or Registration District or Registration Division, or in other Districts or Counties, or Registration Districts or Registration Divisions, as the case may be; but no such donation or deed of gift, *inter vivos*, so heretofore or hereafter registered as aforesaid, shall be held or deemed to be null and void for want of having been also registered at the place or places, and in the manner required by the laws in force in Lower Canada, at the time of the passing of the said Ordinance: any law, usage or custom, to the contrary notwithstanding: provided always, that nothing in this Act contained shall operate to the prejudice of rights acquired by *these* parties by the laws in force at the

time of the passing of this Act, in respect of lands and tenements, or real estate given by each and every donation or deed of gift, *inter vivos*, as above mentioned."

Upon the re-hearing of the case, DUMAS, of Counsel for Plaintiff:—I call the attention of the Court to the word "these" in the third line of the proviso of the clause cited : this is a typographical error, which has been committed in the English version of the Statute, and the effect is to destroy the sense of the proviso altogether. The word "these" has been inserted for the word "third," and the error is evident by comparing the English with the French text. The object of the proviso is to exclude certain parties from the operation of the Law, and if no error has been committed, then the proviso has no effect. There is no question as to the claim of the parties, and the Court are bound to give the law, as it stands, a reasonable interpretation. If, then, it appears that the word "these," in the proviso, in the English text, is an error, and that the proviso can have no effect except on the construction to be drawn from the French text, the Court will feel itself bound to give it that construction.

DAY, Justice, in delivering judgment observed :—It is a palpable error, because no parties are mentioned in the preceding clause : but what is the Court to do ? It is not for us to presume what meaning the Legislature intended : we must take the text as we find it. The Opposition must be maintained, with costs.

VANFELSON, Justice :—The French version is correct : I would have been willing to discharge the *délibéré* and re-open the *enquête* in order to allow a reference to the rolls of Parliament, but my colleagues think differently.

MONDELET :—The Court must take the Statute as it finds it. If there has been a typographical error, it is unfortunate,

but it is not for us to go to the archives to see whether that is the case or not. It has been suggested we should take the French version. This would be to admit that the law has two texts which I, as a Judge, cannot do. It is astonishing that no one has thought of making the French version authority as well as the English. Nevertheless the translation in French is not authority as law. Either through wilfulness or ignorance the English text alone has been imposed upon the French Canadian population, and there is no French version having the authority of Law.

CHERRIER : (Q. C.) Inquired whether the opinion just expressed by the learned Judge, (**MONDELET**) as to the non-existence of two texts, was to be taken as the opinion of the Court.

DAY : The judgment was given in a few words, and does not touch that point, my learned brother had a perfect right to say what he did say, but in this, as in all other cases, the opinions pronounced by individual judges, apart from the judgment itself, are not binding on the Court.

DUMAS, for Plaintiff.

CHERRIER, DORION and DORION, for Opposants.

COUR SUPERIEURE.—QUEBEC.

Présents : BOWEN, Juge-en-chef, et MEREDITH, Juge.

No. 627 } HUDON,..... *Demandeur*,
 de } vs.
 1851. } HUDON et AL,..... *Défendeurs*.

Jugé, qu'un bail d'affermage partiaire, imposant au preneur certaines obligations qu'il doit accomplir en personne, n'est pas cessable : que la cession de tel bail donne droit au bailleur d'en demander l'annulation : que la résiliation de telle cession, les choses n'étant plus entières, et la demande en rescision portée, ne peut priver le bailleur de son droit absolu de faire annuler tel bail.

Held, that a lease d'affermage partiaire, by which the lessee has undertaken to perform personally certain obligations, cannot be, by such lessee, assigned to a third party : that the assignment of such lease gives the lessor the right of demanding the rescission of the contract ; that the resiliation of such assignment, the assignment having been acted upon, and the action to rescind the lease having been instituted, cannot deprive the lessor of his absolute right to cause the original lease to be rescinded.

Jugement le 25 février, 1851.

L'action du Demandeur avait pour objet la résiliation d'un bail à ferme, sous les circonstances qui vont être expliquées. Le Demandeur, Firmin Hudon, par acte fait et passé le 26 avril, 1844, donna à bail d'affermage, pendant la durée de sa vie, diverses terres en culture, à l'un des Défendeurs, Joseph Hudon, à la condition de les bien cultiver, clore et fossoyer ; de les ensemençer à ses frais ; de paccager et hiverner divers animaux du bailleur ; de chauffer, loger et éclairer le dit bailleur ; d'entretenir, réparer et renouveler les bâtiments ; de procurer un serviteur au bailleur, et de lui donner la moitié des produits des terres en question. Le preneur s'étant réservé le droit de se départir de ce bail au bout d'une ou plusieurs années ; mais il était convenu entre les parties, que si le preneur continuait le bail jusqu'au dé-

cès du bailleur, et que s'il accomplissait ponctuellement les obligations auxquelles il s'était soumis, dans ce cas le bailleur lui faisait une donation pure et simple des terres en question, pour en jouir à perpétuité à compter du décès du bailleur, et ce aux charges et conditions ordinaires énumérées dans de pareils actes. En vertu de ce bail, le Défendeur, Joseph Hudon, s'était mis en possession des biens affermés, et en avait joui jusque vers l'année 1849 ; mais le 23 novembre 1849, par acte passé devant notaires, il vendit, céda et transporta au nommé Joseph Gagnon, l'autre Défendeur, tous les droits de fermage, de propriétés et autres résultant du bail ci-haut mentionné. Aussitôt après son acquisition, le Défendeur, Joseph Gagnon, fit signifier au Demandeur un acte par lequel il s'obligeait d'accomplir envers lui, toutes les obligations contenues dans le bail mentionné plus haut. Le Demandeur refusa de consentir à ce transport, fit faire un protêt contre les parties concernées dans cette transaction, et intenta contre le cédant, Joseph Hudon, et le cessionnaire, Joseph Gagnon, la présente action ayant pour objet de faire déclarer le transport du bail injuste, illégal et nul, et comme conséquence de ce transport, de demander la rescision du bail originaire, et la restitution des biens affermés et donnés. Aussitôt après la signification de cette action, le Défendeur, Joseph Hudon, obtint de son cessionnaire, la résiliation du transport du bail, en fit donner avis au Demandeur, et offrit de lui payer les frais qu'il avait encourus jusque là. Cependant le Demandeur ne voulut point se désister de son action, et la rapporta en cour. En anticipant l'espèce de défense que Joseph Hudon se proposait de faire à cette action, le Demandeur avait allégué dans sa déclaration " Qu'en consentant ce bail, il avait eu particulièrement en vue de faire choix d'une personne en laquelle il avait confiance, qu'il savait être capable et en état de bien cultiver et entretenir les terres ainsi affermées, et aussi d'accomplir et exécuter envers lui toutes les charges et obligations stipu-

lées au bail ; de lui rendre tous les services dont il avait besoin sur ses vieux jours, lesquels il désirait passer avec une personne de son choix, qu'il estimait et à laquelle il voulait aussi faire du bien, à cause des liens de parenté et d'amitié qui existaient entr'eux : et que dans le but de l'induire à se bien comporter envers lui, et à continuer le bail jusqu'à son décès, il lui avait fait la donation conditionnelle portée au dit bail."

Il ajoutait qu'évidemment ce bail n'était pas cessible, et que le transport illégal qu'en avait osé faire le Défendeur, Joseph Hudon, l'avait mis au néant et annulé de plein droit, ou au moins lui avait donné le droit d'en demander l'annulation. Les conclusions de son action portaient, " que pour les causes susdites, le transport fait par le dit Joseph Hudon au dit Joseph Gagnon, soit déclaré injuste, illégal et contraire à la loi ; et que par suite du dit transport, le bailleur ait droit à la rescision du bail, que ce bail soit rescindé et annulé, et les Défendeurs soient condamnés à remettre le bailleur en la possession de ses biens, &c. &c."

A cette action les Défendeurs répondirent, qu'ayant résilié le transport du bail, offert de payer les frais encourus, et remis toutes choses en leur état primitif, il n'y avait plus lieu à la rescision du bail, et qu'il devait demeurer en sa pleine force et vigueur : en sorte que la question débattue entre les parties, n'était pas de savoir si le bail en question était cessible ou non, (car elles paraissaient s'accorder à le considérer comme non cessible,) mais bien si le transport avait eu l'effet d'annuler de plein droit et pour toujours le dit bail, et de donner au bailleur le droit absolu d'en demander l'annulation, nonobstant la résiliation que l'on avait faite du transport.

Quant à cette prétendue résiliation, la prétention du Demandeur était que le Défendeur, Joseph Hudon, avait aban-

donné les lieux, et qu'au temps de l'institution de son action le nommé Joseph Gagnon était en possession, de sorte que les choses n'étaient plus entières, et que le Demandeur avait des droits acquis dont il ne pouvait être privé.

Les parties réglèrent entre elles la question de fait, au moyen d'une admission établissant les matières de fait énoncées de part et d'autre, dans la demande et dans les défenses, et soumirent à la Cour l'unique question de savoir si le Défendeur, au moyen de la résiliation sus-mentionnée, pouvait échapper aux conséquences de son transport illégal, et prévenir l'annulation de son bail. (1)

Jugement en faveur du Demandeur, comme suit :

Considérant que par le bail allégué en la déclaration, fait et passé devant Mtre. Garon et Collègue, Notaires Publics, le 26 avril, 1844, le Demandeur a loué au Défendeur, Joseph Hudon, la terre et le terrain désignés au dit bail, par tenants et aboutissants, ainsi que la pêche à marsouin, connue sous le nom de *Petit Dégras*, ou pêche des Gagnon ; lequel Bail a été consenti par le Demandeur au dit Défendeur, Joseph Hudon, aux diverses charges, clauses et conditions y mentionnées, et entre autres à la charge par le Défendeur de cultiver les terres sus-affermées, par saison et en bon père de famille, sans les dessoler ni détériorer, d'entretenir les dites terres de clôtures et fossés convenablement et à la demande des voisins, et de faire en neuf tous les fossés et clôtures né-

(1) Sur la question de savoir si un tel bail est cessible, et si la cession donne lieu à la rescision absolue du bail, les conseils du demandeur citèrent :

Brillon, Dic. des Arrêts, vbo. Bail, p. 427 :—3 N. Dén. vbo. Bail, p. 33 :—Lahaie, *du colon partiel*, 773 :—17 Duranton, No. 130 à 133 :—Duvergier Tr. du Louage, Nos. 87, 88 :—Dalloz, vbo. Louage, No. 643 :—Guyot, vbo. Bail, p. 32 :—Merlin, vbo. Bail, p. 355 :—1 Troplong, *du Louage*, No. 134 :—Poth. Tr. du Louage, 283 et 284 :—Idem, Obl. No. 672 :—2 Grenier, p. 312.

Les conseils des défendeurs citèrent :

Domat, p. 51, No. 12, et p. 55, No. 9 :—Anc. Dén. vbo. Résiliation, p. 306, No. 5 :—Troplong, Tr. du Louage, Nos. 139 et 140 :—Idem, Vente, No. 61 :—1 Duvergier, Vente, Nos. 433, 434.

cessaires pour le plus grand avantage de la culture des dites terres ; de fournir seul et à ses frais toute la semence par chaque année du dit bail ; de paccager, hiverner et soigner pour le bailleur les divers animaux mentionnés au dit bail, et lui fournir du bois de chauffage et autres effets y détaillés ; considérant que le dit bail est un bail partiaire, formant, quant aux objets y mentionnés, une société entre le Demandeur et le Défendeur, Joseph Hudon, imposant au dit Défendeur l'obligation d'accomplir en personne les diverses charges, clauses et conditions auxquelles il s'est obligé par icelui ; que le dit Défendeur ne pouvait en conséquence céder et transporter à autrui les droits à lui résultant en vertu du dit bail, sans le consentement du Demandeur : considérant aussi qu'il est constaté en la présente cause que le dit Défendeur, Joseph Hudon, a, en violation de ses engagements envers le Demandeur, cédé et transporté à Joseph Gagnon, aussi Défendeur en cette cause, par acte fait et passé pardevant Mtre. St. Jorre et Collègue, Notaires Publics, le 23 novembre, 1849, tous ses droits et prétentions en vertu du susdit bail ; que le dit Joseph Hudon dit Beaulieu a de plus abandonné la culture des dits terrain et terre, ainsi que l'exploitation de la dite pêche, et a transporté le lieu de son domicile en une autre paroisse : considérant en outre que lors de l'institution de la présente action, le Défendeur, Joseph Gagnon, était en possession des droits à lui cédés par le dit Joseph Hudon, par l'acte de cession sus-mentionné, et que les droits acquis au Demandeur n'ont pu être détruits par la résiliation de la dite cession alléguée avoir été faite subséquemment, savoir : le 19 avril, 1850—la Cour déboute les dits Défendeurs de leur Exception Péremptoire en droit perpétuelle plaidée en cette cause, déclare le Demandeur bien fondé en sa demande, et en conséquence rescinde et annule, à compter du 8 avril, 1850, jour de la signification de la présente action, le bail à ferme consenti par le Demandeur au Défendeur, Joseph Hudon, par acte fait et passé à la Rivière

Ouelle, en la demeure du bailleur, par-devant Garon et Collègue, Notaires Publics, le 26 avril, 1844, et condamne les Défendeurs, Joseph Hudon et Joseph Gagnon, à rendre et restituer au Demandeur, sous 15 jours de la signification du présent jugement, tous et chacun les immeubles et pêche loués au dit Joseph Hudon, suivant le dit bail ; sinon et à défaut de ce faire, permet au Demandeur de se faire mettre en possession par les voies de droit. La Cour condamne les Défendeurs à payer au Demandeur les frais de cette action ; réservant au Demandeur tel recours qu'il peut avoir en loi pour les dommages qu'il prétend avoir soufferts.

HUDON et PLAMONDON, pour le Demandeur.

CARON, conseil du Demandeur.

CHABOT et DELAGRAVE, pour les Défendeurs.

COUR SUPÉRIEURE.—QUÉBEC.

Présents : BOWEN, Juge-en-Chef, DUVAL et MEREDITH, Juges.

1594 { LANGLOIS,..... Demandeur,
de { vs.
1852. { MARTEL,..... Défendeur.

Jugé, que l'arrêt du Roi de France, du 6 juillet, 1711, n'est applicable qu'au cas où un seigneur aurait refusé de concéder ; que celui du 15 Mars, 1732, ordonne uniquement le défrichement des terres, et prohibe la vente de celles en bois debout ; mais que ces deux arrêts ne peuvent nullement s'appliquer au cas où un censitaire se plaint du taux des rentes qu'on lui a imposées ; qu'il n'y a point de lois positives qui fixent le taux des rentes ; qu'un contrat de concession qui impose un sol de cens et rentes, et sept sols de rente constituée, n'est pas une vente, et conséquemment n'est pas nul, ni annulable ; que dans le cas particulier la Cour n'a pas le pouvoir de diminuer le taux des rentes.

Held that the *arrêt* of the King of France, of the 6th July, 1711, can only be made to apply to cases where the seignior has refused to grant his unconceded lands ; that the *arrêt* of the 17th March, 1732, merely enjoins the clearing of forest lands, interdicting the sale of such lands ; but that these two *arrêts* afford no remedy to a censitaire who complains that the rate of *rentes* is too high ; that there is no positive law limiting the rate of *cens et rentes* ; that a deed of concession imposing one *sol* of *cens et rentes* and seven *sols* of *rente constituée*, is not a deed of sale, and is not consequently void or voidable ; and that in the case submitted, the Court has no power to reduce the rate of *cens et rentes*.

Jugement le 13 janvier, 1852.

L'action était une demande de la part d'un seigneur contre son censitaire, pour des arrérages de cens et rentes foncières et constituées dus en vertu d'un contrat de concession.

La déclaration du Demandeur alléguait :

“ Que par acte passé devant Panet, Notaire, le 10 Septembre, 1839, le Demandeur, seigneur de partie de Bourg Louis, ou New Guernsey, concéda au Défendeur, à titre de cens, de rentes foncières non rachetables, et rentes constituées, une terre,” désignée au dit acte.

“ Que cette concession fut faite à la charge de payer, par chaque arpent en superficie de la terre ainsi concédée, *“ un sol ou demi penny, courant, de cens et rente seigneuriale, perpétuelle et non rachetable, et sept sols ou trois pence et demi, courant, de rente annuelle et constituée, sur le pied de six pour cent par an, rachetable à volonté, formant en tout huit sols ou quatre pence, courant, de cens et rentes tant foncières que constituées par chaque arpent de terre en superficie ;”*

“ Que les arrérages se montent à £16, et le Demandeur conclut à une condamnation pour cette somme contre le Défendeur.”

A cette action le Demandeur plaida :

1. “ Que la terre désignée en la déclaration du Demandeur et dans l'acte de concession, mentionné, était, avant et lors de la passation du dit acte, une terre en bois debout, non concédée, et formait partie de la seigneurie de Bourg Louis, aussi appelée New Guernsey, et du domaine d'icelle, comme n'ayant jamais été concédée ni chargée de redevances seigneuriales ;”

2. “ Que par la loi du pays et par les titres ou octrois de la dite seigneurie, le seigneur d'icelle, et nommément le Demandeur, agissant comme seigneur de partie d'icelle, était tenu de concéder les terres de la dite partie de seigneurie à titre de cens et rentes ou redevances seigneuriales, suivant le taux légal reconnu en cette Province, et suivant le taux des cens et rentes reconnu alors et auparavant dans la dite seigneurie, lequel taux était d'un sou par chaque arpent en superficie ; mais qu'il était défendu au dit seigneur, ou au Demandeur, de vendre les dites terres moyennant un prix ou somme d'argent ;”

3. “ Or le Défendeur allègue, que par le dit acte de concession mentionné en la déclaration du Demandeur, lui le

Demandeur a vendu la dite terre et fixé un prix d'argent exigible pour la concession d'icelle, comme suit : " Que la dite concession est faite à la charge par le dit Défendeur concessionnaire, de payer au dit Demandeur, seigneur concédant, pour chaque arpent en superficie de la dite terre concédée, un sol ou demi penny, courant, de cens et rente seigneuriale, perpétuelle et non rachetable, *et sept sols ou trois pence et demi, courant, de rente annuelle et constituée, sur le pied de six pour cent par an, rachetable à volonté* ; les dits cens et rentes portant profit de lods et ventes, et *payables, ainsi que les dites rentes constituées, au premier novembre chaque année* ;"

4. " Qu'en conséquence, cette partie du dit acte qui stipule un prix de vente ou le paiement de sept sols de rente annuelle et constituée, rachetable à volonté, en sus des cens et rentes ordinaires, est nulle, illégale et de nul effet, en autant qu'il est défendu au seigneur censier ou féodal de vendre les terres non-concédées de sa seigneurie, sous aucune forme ou prétexte quelconque, à peine de nullité de la dite vente, et sous peine de restitution envers le censitaire des sommes d'argent qu'il aurait ainsi exigées illégalement de lui à raison de telle vente, et cela par les lois de ce pays, et spécialement par les arrêts ou ordonnances du six juillet, mil sept cent onze, et du quinze mars, mil sept cent trente-deux ;"

5. " Pourquoi, vu les prémisses, le Défendeur a droit de demander et demande, que la partie du dit acte, stipulant le prix de vente pour la dite terre, savoir : sept sols de rente annuelle et constituée, rachetable à volonté, par chaque arpent en superficie, soit déclarée nulle et de nul effet, illégale et non avenue, et que par le jugement de cette cour, l'action du Demandeur soit déboutée avec dépens ;"

6. " Et le Défendeur allègue en outre, comme autre moyen d'exception péremptoire en droit perpétuelle, en réponse à

la demande du Demandeur, que le taux du cens et redevance seigneuriale auquel le Demandeur était tenu de concéder la dite terre, était le taux ancien et ordinaire, auquel les terres étaient et ont été premièrement et anciennement concédées dans la dite seigneurie de Bourg Louis ;”

7. “ Que ce taux n’était rien de plus qu’un sol de cens et rente seigneuriale par chaque arpent en superficie, lequel taux est mentionné et fixé par le Demandeur lui-même, dans le dit acte de concession, à un sol de cens et rente par chaque arpent en superficie, comme susdit, ce que le Défendeur a offert de payer, a toujours été prêt à le faire, l’est encore, et l’a de fait payé ;”

8. “ Qu’en conséquence, un taux de cens et rente excédant un sol par arpent en superficie est illégal, et que l’excédant doit être réduit et retranché ;”

9. “ Pourquoi le dit Défendeur supplie humblement, que pour les causes susdites, par le jugement de cette Honorable Cour, il soit déclaré et adjugé : 1o. Que la partie du susdit acte de concession, qui stipule un prix de vente pour la dite terre, savoir, sept sols de rente constituée et annuelle, rachetable à volonté, par chaque arpent en superficie, soit déclarée illégale, nulle et de nul effet et non avenue, tant pour le passé que pour l’avenir ; 2o. Que le taux de cens et rente reste comme stipulé dans le dit contrat de concession à un sols de cens et rente par chaque arpent en superficie, et soit réduit au dit taux ou à tel autre taux que la loi reconnaît comme légal, le Défendeur se réservant de prendre toutes autres conclusions nécessaires, et que l’action du dit Demandeur soit déboutée avec dépens.

LELIEVRE, pour le Demandeur :

Il n’y a point de loi qui fixe la quotité des cens et rentes ; le cens varie aussi bien dans le montant, lorsqu’il est payable en argent, que dans le mode du paiement ; il se paie quel-

quelquefois en volailles, quelquefois en grains, outre une modique redevance en argent ; ces denrées doivent, de toute nécessité, varier dans leur valeur ; si donc la loi fixait la quotité des cens et rentes, il ne serait pas loisible au seigneur de les imposer autrement qu'en une somme d'argent fixe. (1)

La valeur de l'argent est beaucoup moindre aujourd'hui qu'elle n'était il y a un siècle passé ; et le sol de cens, avec la rente de deux ou trois sols, imposée il y a cent ans, équivalaient aux cens et rentes imposés aujourd'hui, et réclamés en la présente cause. La stipulation d'une rente constituée rachetable, est une stipulation favorable au censitaire, qui peut se libérer par le remboursement, la prescription, ou la vente par décret. (2)

Les arrêts de 1711 et 1732, ne contiennent aucune disposition qui fixe la quotité du cens : s'il en est ainsi, le Défendeur ne peut pas se plaindre qu'on lui ait laissé la faculté de se libérer par le rachat.

TESSIER, pour le Défendeur :

Le contrat de concession contient deux parties distinctes ; l'une, sous forme de concession, stipulant un sol de cens et rente par arpent en superficie ; l'autre, sous forme de vente, stipulant une rente constituée, rachetable, de sept sols par arpent en superficie. Dans le cas de décret, le seigneur pourrait réclamer le capital de cette rente constituée, et par le rachat et extinction graduelle de ces rentes, le droit de quint serait moindre, et la couronne, comme le censitaire, a intérêt d'empêcher le seigneur de vendre ses terres en bois debout. D'ailleurs, l'édit est positif, et prononce la peine de nullité de ces ventes, et même restitution du prix, s'il est payé.

(1) *Poquet de Livonière*, p. 534 :—*Dic. de Droit*, vbo. *Cens*, p. 249 :—*Renauldon*, *Dr. Seig.* pp. 152, 157 :—*Prudhomme*, pp. 37, 129.

(2) *Denisart*, 4 v. vbo. *Rentes foncières*, No. 16, p. 245.

Quant aux taux des cens et rentes, les édits du 6 juillet, 1711, et du 15 mars, 1732, déclarent que les terres seront concédées au taux accoutumé. Or, on ne trouve aucun exemple avant 1763, d'aucun taux excédant quatre sols par arpent; un taux excédant cela n'est donc pas un taux accoutumé.

Les censitaires ont fait de constants efforts pour maintenir leurs droits devant les tribunaux, et parmi les nombreux précédents que l'on trouve, (cités après) il y en a beaucoup qui ont décidé en faveur des censitaires sous le gouvernement français, et il n'y en a pas où les Cours, depuis la cession du pays, aient prononcé que ces anciennes ordonnances ne fussent pas en force; il est vrai que les tribunaux ont souvent évité de décider les questions sur leur vrai mérite, il ne reste donc aux tribunaux actuels que le devoir de les mettre à exécution dans l'intérêt des censitaires et des seigneurs.

Le rapport des commissaires sur la tenure seigneuriale, de 1843, prononce que ces édits sont en force, et que les pouvoirs de l'Intendant sont transférés à nos Cours actuelles.

(1)

BOWEN, Juge-en-Chef :—Cette cause importante a été plaidée avec beaucoup de soin de part et d'autre, et cependant les questions qu'elle présente ne sont pas nouvelles. L'action a été intentée pour le recouvrement d'une somme de £16 courant, arrérages de cens et rentes dus au Demandeur, par le Défendeur, en vertu d'un contrat de concession.

(1) Acte 17, George III :—Acte 34, George III :—Rapport des Commissaires sur la tenure seigneuriale, 1843 :—Cugnet, *Traité des Fiefs*, p. 60 :—1 Henrion de Pansey, *Dissertations Féodales*, pp. 275 et 276 :—Ancien Denisart, *vbo. Cens* :—Arrêt du 29 mai, 1713 :—2 Édits et Ordonnances, p. 39. :—Arrêts du 15 février, 1716, du 28 juin, 1721, du 20 septembre, 1721, du 16 octobre, 1721, du 21 février, 1731, du 20 juillet, 1733, du 23 janvier, 1738, et du 23 février, 1748. Sur la question de savoir si l'on peut déclarer partie d'un Acte nulle, sans le déclarer nul en entier :—Perrin, *Traité des Nullités*. . . . :—Guyot, *Repertoire de Jurisprudence*, *vbo. Nullités* :—Ferrière, *Dictionnaire de Droit*, *vbo. Nullités*.

A cette action le Défendeur a opposé les dispositions de l'arrêt du 6 juillet, 1711, qui se trouve au 1 Vol. des Edits et Ord. p. 321. (1) et les dispositions de celui du 25 mars, 1732, qui se trouve aussi au 1. Vol. des Edits et Ord. p. 486. (2)

Arrêt du 6 juillet, 1711.

(1) " Le Roi étant informé que dans les terres que Sa Majesté a bien voulu accorder et concéder en Seigneurie à ses Sujets en la *Nouvelle France*, il y en a une partie qui ne sont point entièrement habitées et d'autres où il n'y a encore aucun habitant d'établi pour les mettre en valeur, et sur lesquelles aussi ceux à qui elles ont été concédées en Seigneurie, n'ont pas encore commencé d'en défricher pour y établir leurs domaines ; Sa Majesté étant aussi informée qu'il y a quelques Seigneurs qui refusent, sous différents prétextes, de concéder des Terres aux habitants qui leur en demandent, dans la vue de pouvoir les vendre, leur imposant en même temps les mêmes droits de redevances qu'aux habitants établis, ce qui est entièrement contraire aux intentions de Sa Majesté, et aux clauses des titres des concessions par lesquelles il leur est permis seulement de concéder les Terres à titre de redevance ; ce qui cause aussi un préjudice très considérable aux nouveaux habitants qui trouvent moins de terre à occuper dans les lieux qui peuvent mieux convenir au commerce : à quoi voulant pourvoir, Sa Majesté étant en son Conseil, a ordonné et ordonne, que dans un an du jour de la publication du présent Arrêt, pour toute préfixion et délai, les habitants de la *Nouvelle France*, auxquels Sa Majesté a accordé des Terres en Seigneurie, qui n'ont point de domaine défriché, et qui n'y ont point d'habitants, seront tenus de les mettre en culture et d'y placer des habitants dessus, faute de quoi, et le dit temps passé, veut Sa Majesté, qu'elles soient réunies à son Domaine à la diligence du Procureur Général du Conseil Supérieur de *Québec*, et sur les Ordonnances qui en seront rendues par le Gouverneur et Lieutenant Général de Sa Majesté et l'intendant au dit pays : Ordonne aussi Sa Majesté que tous les Seigneurs au dit pays de la *Nouvelle France*, aient à concéder aux habitants, les terres qu'ils leur demanderont dans leurs Seigneuries à titre de redevances, et sans exiger d'eux aucune somme d'argent, pour raison des dites concessions, sinon et à faute de ce faire, permet aux dits habitants de leur demander les dites Terres par sommation, et en cas de refus de se pourvoir par devant le Gouverneur et Lieutenant Général et l'Intendant du dit pays, auxquels Sa Majesté ordonne de concéder aux dits habitants les Terres par eux demandées dans les dites Seigneuries, aux mêmes droits imposés sur les autres Terres concédées dans les dites Seigneuries, lesquels droits seront payés par les nouveaux habitants entre les mains du Receveur du Domaine de Sa Majesté en la ville de *Québec*, sans que les Seigneurs en puissent prétendre aucun sur eux, de quelque nature qu'ils soient, et sera le présent arrêt enregistré au Greffe du Conseil Supérieur de *Québec*, lu et publié partout où besoin sera. Fait au Conseil d'Etat du Roi, Sa Majesté y étant, tenu à *Marly*, le sixième jour de juillet, mil sept cent-onze."

(Signé.)

PHÉLIPPEAUX.

Arrêt de 1732.

(2) "Le Roi s'étant fait représenter en son Conseil, l'Arrêt rendu en icelui le six juillet, mil sept cent onze, portant que les habitants de la *Nouvelle France*, auxquels il aurait été accordé des Terres en Seigneuries, qui n'y auraient pas de Domaine défriché, ni habitants établis, seraient tenus de les mettre en culture, et d'y placer des habitants dans un an du jour de la publication du dit Arrêt, passé lequel temps, elles demeureraient réunies au Domaine de Sa Majesté, et que les dits Seigneurs seraient aussi tenus de concéder aux habitants qui les demanderaient, à titre de redevances, et sans exiger aucune somme d'argent, sinon permis aux dits habitants en cas de refus, après une sommation, de se pourvoir par devant le

Ces arrêts avaient pour objet de forcer les seigneurs à concéder les terres dans leurs seigneuries, et de les empêcher de vendre les terres en bois debout. Le Défendeur ne se trouve pas dans les cas prévus par ces arrêts, et cependant il voudrait faire annuler son contrat en partie, et le faire maintenir en partie. L'Arrêt de 1711 est dans la nature d'un statut pénal, et doit s'interpréter strictement. Je suis d'avis que le Défendeur ne se trouve nullement dans le cas prévu. Il n'y a eu ni sommation au seigneur de concéder, ni refus de sa part de le faire : au contraire la convention intervenue entre les parties a été entièrement libre et volontaire. Le Défendeur n'a pas même allégué dans les défenses les moyens nécessaires pour réussir, la demande d'une concession, et le refus du seigneur de faire telle concession.

J'ai dit que la question n'était pas nouvelle : à l'appui de cette assertion, je citerai une décision applicable au présent cas, rendue dans la Cour du Banc du Roi, à Québec, en

Gouverneur et Lieutenant Général et l'Intendant du dit pays, pour en obtenir les concessions, aux mêmes droits imposés sur les autres terres concédées, lequel droit serait payé au Receveur du Domaine de Sa Majesté, sans que les Seigneurs puissent rien prétendre sur les terres ainsi concédées ; et un autre Arrêt du même jour six juillet, mil sept cent onze, portant que les concessionnaires des terres en rôtire seraient tenus d'y avoir feu et lieu et de les mettre en valeur dans un an du jour de la publication, à peine de réunion au Domaine des Seigneurs sur les Ordonnances de l'Intendant. Et Sa Majesté étant informée, qu'au préjudice des dispositions de ces deux Arrêts, il y a des Seigneurs qui se sont réservés dans leurs terres des Domaines considérables, qu'ils vendent en bois debout au lieu de les concéder simplement à titre de redevances, et que des habitants qui ont obtenu des concessions des Seigneurs les vendaient à d'autres, qui les revendaient successivement, ce qui opère un commerce contraire au bien de la Colonie, et étant nécessaire de remédier à des abus si préjudiciables ; Sa Majesté étant en son Conseil, a ordonné et ordonne que dans deux ans à compter du jour de la publication du présent Arrêt, tous les propriétaires des terres en Seigneuries non encore défrichées, seront tenus de les mettre en valeur et d'y établir des habitants, sinon, et le dit temps passé, les dites terres seront réunies au Domaine de Sa Majesté en vertu du présent Arrêt, et sans qu'il soit besoin d'autre. Fait Sa Majesté très-expresses inhibitions et défenses à tous Seigneurs et autres propriétaires, de vendre aucune terre en bois debout, à peine de nullité des contrats de vente, et de restitution du prix des dites terres vendues, lesquelles seront pareillement réunies de plein droit au Domaine de Sa Majesté, et seront au surplus les dits deux Arrêts du six juillet, mil sept cent onze, exécutés selon leur forme et teneur, et le présent sera enregistré au Greffe du Conseil Supérieur de Québec, lu et publié partout où besoin sera ; Fait au Conseil d'Etat du Roi, Sa Majesté y étant, tenu à Versailles, le quinze mars, mil sept cent trente-deux."

(Signé,)

PHÉLIPPEAUX.

1820, No. 92, Dubois vs. Caldwell. C'était une action *in factum*, intentée par un censitaire contre son seigneur. La déclaration alléguait en substance que le Défendeur s'était fait payer 1000 livres pour la concession d'une terre, dans la seigneurie de Gaspé, à un taux d'intérêt fixe, outre le cens ; et concluait à ce que la terre en question fut dégrevée de cette redevance annuelle, imposée en sus du cens, et à ce que le Demandeur fut exonéré du paiement de ce capital de 1000 livres.—Le Défendeur répondit à cette action par une défense en droit.—*Per curiam* :—Cette action, (Dubois vs. Caldwell,) est fondée sur l'une des clauses de l'arrêt du 6 juillet 1711, qui statue : “ Que tous les seigneurs au dit pays de la *Nouvelle France*, aient à concéder aux habitants les terres qu'ils leur demandent dans leurs Seigneuries à titre de redevances, et sans exiger d'eux aucune somme d'argent, pour raisons des dites concessions, sinon et à défaut de ce faire, permet aux dits habitants de leur demander les dites terres par sommation, et en cas de refus, de se pourvoir par-devant le Gouverneur et Lieutenant Général, et Intendant du dit pays, auquel Sa Majesté ordonne de concéder aux dits habitants les terres par eux demandées dans les dites Seigneuries, aux mêmes droits imposés sur les autres terres concédées dans les dites Seigneuries : lesquels droits seront payés par les nouveaux habitants entre les mains du Receveur du Domaine de Sa Majesté.” Cette loi doit être assimilée à un statut pénal, de sorte que le Demandeur, pour réussir, doit se trouver compris dans la lettre même de la loi. L'Arrêt exige, en premier lieu, que le seigneur soit mis en demeure de concéder au taux ordinaire de sa Seigneurie, et pour nulle autre considération, et le recours qu'il accorde ne peut avoir lieu que dans le cas de refus. Comme la déclaration n'allègue ni telle sommation ni tel refus, elle est fautive dans un point essentiel, et la défense en droit doit être maintenue.

Telle est la décision rendue dès 1820 sur le sujet, et les mêmes défauts qui se trouvaient dans la déclaration de Dubois, se trouvent également dans l'exception de Martel.

L'on peut demander avec raison, (et c'est une question qui se présente dans la cause citée) si la Cour a juridiction dans le cas présent, le pouvoir conféré par l'arrêt du 6 juillet, 1711, n'étant pas dans les attributs ordinaires du pouvoir judiciaire ? En effet, c'était le pouvoir de faire une concession de terres, à la place du seigneur, et ce pouvoir était attribué au Gouverneur et à l'Intendant. Le premier était un fonctionnaire purement politique : le second possédait des attributs administratifs et judiciaires. Voyez aussi ; " Ferlan et Deguise, en appel, 5 janvier, 1789, Smith, juge-en-chef, siégeant." On pourrait aussi demander, si le censitaire, ayant consenti au titre de concession, et pris possession de la terre, n'avait pas par là renoncé au bénéfice de l'arrêt, suivant la règle : *unicuique licet juri pro se introducto renuntiari*.

Il est donc évident que nous ne pouvons faire l'application des arrêts de 1711 et 1732 au cas actuel, et que jugement doit être prononcé en faveur du Demandeur.

DUVAL, Juge :

Cette cause est d'une grande importance pour le seigneur et pour le censitaire ; mais la question, telle qu'elle est présentée, n'offre pas beaucoup de difficulté. Le Défendeur plaide qu'il n'est tenu de payer qu'un sol de cens, et que quant à la somme ou redevance annuelle de sept sols, qui lui est imposée sous forme de rente constituée, il doit en être libéré, et il conclut à la rescision, en partie, du contrat de concession, savoir, quant à cette partie qui lui impose cette redevance de sept sols. Sur quoi fonde-t-il cette prétention ? Ce ne peut être assurément sur les arrêts de 1711 et 1732 ; ces deux arrêts, les seuls qu'on puisse invoquer, n'ont trait

qu'au refus du seigneur de concéder, et à la vente des terres *en bois debout*, auxquels cas il fallait se pourvoir devant le Gouverneur et devant l'Intendant. Il n'y est nullement question du taux des concessions. (*Voir ces arrêts cités plus haut.*) S'ils ont encore force de loi, la Cour n'en peut faire application en partie : il faut qu'ils aient leur plein effet et rendent la concession nulle dans son entier. D'ailleurs, ces arrêts conféraient au Gouverneur et à l'Intendant des pouvoirs administratifs et extra-judiciaires qui n'appartiennent pas à cette Cour.

Ces arrêts ne justifient, en aucune manière, l'exception plaidée en cette cause. Le Défendeur eut pu plaider erreur de droit, et alléguer qu'il avait signé ce contrat sans cause ni motif déterminant, mais il n'a pas jugé à propos de le faire, et par conséquent il ne peut se prévaloir de ce moyen. (1) Il devait en faire une défense spéciale ; et alors il eut été loisible au Demandeur de répondre et de prouver que, vu l'incertitude de la jurisprudence ou l'ambiguïté de la loi, les parties avaient fait entre elles une transaction : et cette réponse eut été concluante. L'on a prétendu que cet acte était une vente ; mais il n'en est rien : cet acte, suivant moi, est purement un acte de concession.

MEREDITH, Juge :

Il serait presque inutile pour moi de rien ajouter aux observations des autres membres de la Cour sur cette cause importante, mais je crois devoir citer les mots même de l'arrêt de 1732, qu'on suppose applicables au cas actuel. Ils sont comme suit :

“ Fait Sa Majesté très-expresses inhibitions et défenses, à tous seigneurs et autres propriétaires de vendre aucune terre

(1) Revue de Woloski, 18 vol. p. 159 :—6 Toullier, Nos. 58 to 71 :—1 Pothier, Ob. 17 :—2 Evans Pothier, 369 :—La Revue, *loco citato*.

en bois debout, à peine de nullité des contrats de vente, et de restitution du prix des dites terres vendues, lesquelles seront pareillement réunies de plein droit au domaine de Sa Majesté."

Le Défendeur, afin de se placer dans le cas prévu par l'arrêt de 1732, a allégué dans sa défense que " La terre désignée en la déclaration du Demandeur, était, avant et lors de la passation du dit acte de concession, *une terre en bois debout*, non concédée, etc. Si le Défendeur eut prouvé cet allégué, nous eussions eu à décider un nombre de questions importantes qui, en l'absence de telle preuve, ne se présentent pas.

CARON, conseil du Défendeur :

Je dois faire observer que le contrat de concession, consenti par le Demandeur au Défendeur, contient une clause qui impose au censitaire la condition *de défricher et mettre en valeur la dite terre*.

MEREDITH, Juge :—Je ne crois pas que, d'après cette stipulation, il faille nécessairement inférer qu'aucune partie de cette terre n'avait été améliorée, et que c'était une terre *en bois debout*, dans le sens de l'arrêt de 1732.

DUVAL, Juge :—Ce n'est point un contrat de vente, et d'ailleurs il n'y a pas de preuve que ce soit une terre en bois debout.

MEREDITH, Juge, continue :—Les arrêts de 1711 et 1732 étaient introductifs d'un droit nouveau dans le système du droit Français introduit dans la colonie, système d'après lequel un seigneur pouvait concéder ses terres au taux convenu entre lui et le censitaire (1). Ces arrêts sont des

(1.) Hervé, 5 v. p. 91 à 122 :—Dunod, partie III. c. X. p. 341 :—1 Argou, p. 159.

lois pénales. Pour assujettir quelqu'un aux pénalités imposées par ces arrêts, il faut que l'infraction dont on se plaint soit une violation de la lettre et de l'esprit de la loi, (1) et la Cour ne peut se contenter d'une présomption quant à un fait essentiel, dont il était facile de faire preuve. Dans le cas présent, six témoins, examinés par le Défendeur, disent qu'ils connaissent la terre en question, aucun d'eux ne dit qu'elle était *en bois debout* lorsqu'elle a été concédée. Je considère la preuve du Défendeur, sur ce point, comme défectueuse, mais vu qu'il peut y avoir à cet égard diversité d'opinions, je n'hésite pas à dire, (et j'ai aussi examiné cette question,) que je partage l'opinion des autres membres de la Cour, savoir, que l'acte dont est question, n'est pas un acte de vente dans le sens de l'arrêt de 1732.

Il est possible, (quoique je ne connaisse pas d'exemple, qu'un acte de concession ait été annulé,) il est possible, dis-je, que si une cause de cette espèce eut été soumise au Gouverneur, ou à l'Intendant, sous le Gouvernement Français, le censitaire eut pu réussir. Mais ces officiers exerçaient des pouvoirs bien différents de ceux qui nous sont confiés, et une très-grande latitude leur était accordée dans l'interprétation et la mise à exécution des lois, qui ne nous appartient pas. Il semble qu'il suffisait à ces officiers de connaître l'intention du Souverain, pour les autoriser à imposer un devoir ou une obligation, sans qu'il fut nécessaire que cette intention se trouva exprimée dans une loi ; tandis qu'avec nos attributions nous devons, dans un cas comme celui-ci, nous astreindre à la lettre de la loi.

Afin de démontrer quels étaient les pouvoirs extraordinaires exercés de temps à autre, par les autorités sous le Gouvernement Français, relativement à la concession des terres, je

(1) Dwaris, p. 737 :—3 Bingham, p. 583.

renvoie à un jugement du 20 juillet, 1733. (1) “ Qui, sur la
 “ requête des seigneurs de Portneuf, condamne les censi-
 “ taires de la dite seigneurie à leur donner copie de leurs
 “ titres, ceux qui n'en ont point d'en prendre aux mêmes
 “ conditions que les anciens, si mieux ils n'aiment se
 “ soumettre à la redevance de trente sols et un chapon par
 “ chaque arpent de front sur trente de profondeur, de six
 “ deniers de cens et du onzième poisson, et faute par eux
 “ d'opter, au choix du seigneur, &c....”

Je renvoie encore à un règlement du 4 Octobre, 1743, passé en vertu d'ordres émanant du Roi, requérant les seigneurs de l'Isle de Mingan, de concéder certaines Iles, à la condition d'une redevance de trois par cent sur les peaux et l'huile de loup-marin préparées par les censitaires. (2)

Je réfère aussi à une ordonnance du 27 mai, 1758, qui soumet toutes les terres dépendant du domaine de la couronne, dans la cité de Québec, à cinq sols, six deniers par an par arpent, et celles de la banlieue à un denier par arpent (3).

Quant à l'arrêt de 1711, les obligations qu'il impose aux seigneurs, quant à la concession des terres, sont dans les termes suivants :

“ Ordonne aussi Sa Majesté, que tous les seigneurs au dit pays de la N. F., aient à concéder aux habitants les terres qu'ils leur demanderont dans leurs seigneuries à titre de redevance, et sans exiger d'eux aucune somme d'argent pour raisons des dites concessions.”

Cet arrêt ne définit pas le taux auquel les seigneurs devaient concéder leurs terres aux censitaires, mais il est

(1) 2 Edits et Ordonnance, p. LXXI, de la Table.

(2) 2 Edits et Ordonnance, p. LXXXII, de la Table.

(3) 2 Edits et Ord. p. 121.

évident, d'après les dispositions y contenues, quant au taux auquel le Gouverneur, Lieutenant-général et l'Intendant devaient concéder, et il résulte de divers arrêts et règlements, que l'intention des Rois de France était de forcer les seigneurs de concéder leurs terres aux taux ordinaires, et que ces taux étaient moins élevés que ceux que l'on charge aujourd'hui. Beaucoup de personnes pensaient ci-devant qu'il devait y avoir eu une loi en existence, dans la colonie, réglant le taux des concessions, et en fixant le *maximum*. Il est néanmoins, je pense, universellement admis que cette supposition était sans aucun fondement. Ainsi donc, en présence d'une loi qui oblige le seigneur à concéder, et en l'absence d'aucune loi fixant le taux des concessions, ou interdisant aux censitaires de payer telles redevances quelconques convenues entre eux et les seigneurs, les cours de justice dans cette colonie, depuis la conquête, autant qu'il a été en mon pouvoir de le constater, ont toujours jugé qu'une convention volontaire, intervenue entre le seigneur et le censitaire, réglant le taux de la redevance, ne peut être annulée sur ce que cette redevance est plus élevée que celles imposées en 1711 et 1732, ou celles imposées en premier lieu dans la seigneurie où s'est établi le censitaire qui demande la réduction de sa concession. Cette doctrine a reçu son application dans plusieurs causes, dans lesquelles j'ai été moi-même concerné comme avocat. En 1840, j'instituai, de la part des représentants de feu le Gén. N. C. Burton, plusieurs actions dans la Cour du B. de la Reine à Montréal, contre des censitaires des seigneuries Bleury, De Léry, Lacolle et Noyan, pour des arrérages de cens et rentes dont le taux était plus élevé que dans le cas actuel. Ces censitaires, et quelques autres personnes, intéressées dans la question, se lièrent ensemble pour contester la légalité de ces demandes, et s'assurèrent, à cet effet, des services professionnels des premiers avocats du barreau de Montréal. Quatre de ces causes (Hamilton vs. Fortin;—même vs. Chouinard;—

même vs. Lamoureux ;—même vs. Brouillette ;—) furent menées à fin. L'unique question soumise à la cour était celle-ci : " Peut-on demander la réduction des cens et rentes stipulés dans un contrat de concession ? " Cette proposition fut soutenue dans l'affirmative avec beaucoup d'habileté, mais sans succès. Le jugement dans l'une de ces causes et les raisons sur lesquelles il est fondé, sont rapportés au long dans le rapport des Commissaires sur la tenure seigneuriale.

Il fut question de porter ces causes en appel ; mais l'idée en fut abandonnée ; et des jugements semblables furent rendus dans toutes les autres causes. A cette époque, les recherches que je dus faire m'avaient convaincu que ces jugements étaient corrects, et aujourd'hui, après un nouvel examen de la question, je ne puis trouver aucune raison pour renverser la doctrine que ces décisions ont consacrée. En conséquence, je concours dans le jugement qui maintient l'action du Demandeur.

Le jugement est comme suit :

La Cour..... considérant que l'arrêt du Roi de France, en date du six de juillet, 1711, invoqué par le Défendeur à l'appui de sa défense, n'est applicable qu'au cas où le seigneur a refusé de concéder aux habitants les terres qu'ils lui demandent, et que l'arrêt du Roi de France, en date du 15 mars 1732, aussi invoqué par le Défendeur à l'appui de sa défense, ordonne à tous les propriétaires des terres en seigneurie non alors défrichées, de les mettre en valeur et d'y établir des habitants, et que par le dit arrêt, Sa Majesté fait très-expreses défenses à tous seigneurs et autres propriétaires, de vendre aucune terre en bois debout, à peine de nullité des contrats de vente, et de restitution du prix des dites terres vendues, lesquelles terres seront réunies de plein droit au Domaine du Roi ; considérant qu'il est constaté

que le Demandeur en cette cause, seigneur de la moitié nord-est de la seigneurie Bourg Louis, maintenant appelée New Guernsey, a, par acte fait et passé devant Mtre. Panet et son confrère, Notaires, à New Guernsey, le 17 septembre de l'année 1839, concédé, non point vendu, au Défendeur la terre y désignée, aux diverses charges, clauses et redevances y énoncées, laquelle concession de la dite terre, et icelle, il a possédée depuis la passation du dit acte jusqu'à ce jour ; considérant que les allégués contenus dans l'exception péremptoire en droit, qui sont constatés par la preuve offerte en cette cause, ne sont pas suffisants en loi pour annuler le dit acte de concession, en tout ou en partie, déboute le Défendeur de l'exception péremptoire en droit perpétuelle plaidée en cette cause, et condamne le Défendeur à payer au Demandeur la somme de treize livres, quatre chelins et huit deniers, balance de celle de £16 11 4 courant, pour huit années d'arrérages de cens et rentes dus par le Défendeur au Demandeur, en vertu du susdit acte de concession, échus le 1er novembre, 1848, avec intérêt du 28 avril, 1849, et les dépens.

LELIEVRE et ANGERS, Procureurs du Demandeur.

A. STUART, Conseil.

TESSIER, Procureur du Défendeur.

CARON, Conseil.

COUR SUPERIEURE.—MONTREAL.

Présents : DAY, SMITH et MONDELET, Juges.

No. 605, } BOYER.....Demandeur,
 de } vs.
 1851. } SLOWN *et al.*.....Défendeurs.

Jugé, que sur saisie réelle, l'absence de recors, d'élection de domicile du saisissant et de l'huissier, de mention de l'avant ou de l'après-midi, et du commandement de payer, lorsqu'il a eu lieu sur exécution contre les meubles, n'est pas cause de nullité.

Que le certificat du Shérif que les annonces et publications ont été faites, fait foi jusqu'à ce que tel certificat ait été déclaré faux.

Que faute de s'être opposé dans le temps fixé par le Statut 41 Geo. 3, ch. 7, sect. 11, le saisi est pour toujours forcé du droit d'invoquer les nullités de la saisie de ses immeubles, ainsi que des procédés qui y ont rapport.

Held, that upon seizure of real estate, the absence of a witness to the seizure, *recors*, the want of an election of domicile by the party seizing and by the bailiff, the omission to state whether the seizure was effected before or after twelve o'clock; and that a demand of payment was made, when such execution is directed against the moveables only, are not sufficient grounds to impugn the validity of such seizure.

That the Return of the Sheriff that the advertisements and publications of the sale have been made, is conclusive until such return is declared false.

That a party against whom execution has issued, and who has failed to make opposition within the period prescribed by the 41 Geo. III, cap. 7, sec. 11, is for ever precluded from the right of availing himself of any irregularities in the seizure of his immoveables and of the proceedings thereon.

Jugement le 13 janvier, 1852.

La demande, signifiée le 25 février, 1845, était au pétitoire, revendiquant deux lots de terre acquis par le Demandeur, suivant titres produits, et alléguant l'injuste et illégale détention d'iceux par les Défendeurs. Ces derniers opposèrent à cette demande une exception péremptoire, par laquelle, tout en admettant que le Demandeur avait été propriétaire de ces deux immeubles, ils mettaient en fait qu'il avait cessé de l'être, et que la propriété en était passée aux Défendeurs. Qu'en vertu d'un Bref d'exécution, émané

contre les immeubles du Demandeur, sur un jugement rendu contre lui, dans la Cour du Banc de la Reine du district de Montréal, à la poursuite de John Boston, les susdits lots furent bien et duement saisis, et le 30 avril, 1839, furent adjugés et vendus au dit John Boston, qui en devint le vrai et légitime propriétaire, et en obtint la possession légale. Que le dit John Boston avait ensuite, par deux actes distincts, vendu à chacun des deux Défendeurs un des susdits lots, qu'ils possédaient ainsi à juste titre, et que la demande ne pouvait être maintenue, et ils en demandaient, en conséquence, le renvoi. Par un second plaidoyer, les Défendeurs plaidaient qu'ils ne possédaient pas conjointement, mais séparément, chacun, un des deux lots revendus.

Par sa première réponse, le Demandeur prétendit que la saisie des immeubles, tous les procédés subséquents, ainsi que l'adjudication faite à John Boston, étaient nuls et de nul effet, n'ayant pas été accompagnés des formalités essentielles, imposées par la loi, pour la validité de l'expropriation forcée, et il énonçait les raisons suivantes :

1. " Parcequ'il n'appert pas, par le rapport du shérif, fait " sur le procès-verbal de l'huissier Robert Lovell, que le dit " huissier, chargé par le shérif de ce district, l'Hon. R. de " St. Ours, d'exécuter le dit bref, ait fait au nom du saisis- " sant l'élection de domicile voulue par les ordonnances et " l'usage suivis en ce pays, dans la paroisse où la dite saisie " a été faite, non plus qu'aucune élection de domicile quel- " conque."

2. " Parceque le dit huissier n'a pas fait au Défendeur, " préalablement à la dite saisie, de commandement de payer " les sommes d'argent portées au dit bref."

3. " Parceque ce procès-verbal et rapport ne font point " voir, que le dit huissier se soit fait accompagner de recors " pour pratiquer la dite saisie."

4. "Parcequ'il n'appert point que le dit huissier ait laissé
"au saisi copie du procès-verbal de la prétendue saisie."

5. "Parcequ'il n'appert point, par le dit procès-verbal de
"saisie réelle, si la dite saisie a été faite dans l'avant ou
"l'après-midi du 30 Novembre, 1838, jour auquel le dit
"prétendu procès-verbal comporte que la dite saisie a été
"faite."

6. "Parceque le dit prétendu procès-verbal ne fait point
"mention des sommes d'argent pour lesquelles la prétendue
"saisie a été faite."

7. "Parceque la dite prétendue saisie n'a pas été pré-
"cédée ou accompagnée de l'élection de domicile du saisis-
"sant voulue par la loi, dans la Paroisse où elle a été faite,
"où sont situés les immeubles saisis, non plus que d'une
"élection de domicile quelconque de la part du Demandeur
"saisissant ou de l'huissier."

8. "Parcequ'elle n'a pas été précédée ou accompagnée
"du commandement de payer fait au saisi, tel que voulu
"par la loi et l'usage."

9. "Parceque l'huissier saisissant ne s'est pas fait ac-
"compagner de recors ou témoins qui aient signé ce pré-
"tendu procès-verbal, ou qui aient fait mention des causes
"pour lesquelles ils ne pouvaient signer, quand il a fait la
"prétendue saisie."

10. "Parceque l'huissier saisissant n'a pas laissé au saisi
"en personne, ou à son domicile, copie de l'exploit ou procès-
"verbal de saisie, ainsi que requis par la loi et l'usage."

11. "Parceque la dite saisie ne comporte aucune date
"certaine."

12. "Parceque le rapport du Shérif, Roch de St. Ours, ne
"fait point mention que la vente ou l'adjudication des im-

“ meubles en question, aient été annoncées en temps et lieu
 “ opportuns, et notamment ne fait point voir que la dite vente
 “ et adjudication ont été annoncées un dimanche, à l'issue du
 “ service divin, qui est le temps prescrit par la loi pour la
 “ validité de telle annonce, comme devant avoir lieu à la porte
 “ de l'Eglise de la Paroisse de St. Edouard, où sont situés les
 “ immeubles.”

13. “ Parceque ce n'a pas été un Dimanche, à l'issue du
 “ service divin, à la porte de l'Eglise de la dite Paroisse de
 “ St. Edouard, que l'annonce de la prétendue vente et adjudi-
 “ cation des dits immeubles a eu lieu.”

14. “ Parceque la dite vente et adjudication n'ont pas été
 “ annoncées suivant la loi.”

15. “ Parceque les dites prétendues saisie et adjudication, et
 “ tous les autres procédés intermédiaires et relatifs aux dites
 “ saisie, vente et adjudication, ont été entachés de nullité
 “ absolue par le défaut d'accomplissement des formalités
 “ ci-haut mentionnées, et que le dit John Boston, par la sup-
 “ pression des dites formalités, a obtenu subrepticement la
 “ prétendue adjudication des dits immeubles pour un vil prix
 “ n'ayant eu contre lui aucun enchérisseur, vu que la dite sai-
 “ sie et adjudication ont été faites clandestinement, et sans
 “ avoir eu la publicité que la loi requiert.”

Pour toutes ces raisons le Demandeur alléguait que John Boston n'avait pu acquérir aucun droit de propriété sur les immeubles revendiqués, et il concluait, autant que besoin pouvait être, à ce que les dites prétendues saisie, vente et adjudication, et procédés y relatifs, fussent déclarés nuls et mis au néant, et de plus, que l'exception, en premier lieu plaidée, fut déboutée.

Quant à la seconde exception, la réponse fut une dénégation générale.

Par une réplique spéciale, les Défendeurs disaient que toutes les formalités requises avaient été observées, et que la dite saisie, et tous les procédés y relatifs, avaient été faits au vu et su du Demandeur, qui n'y avait fait aucune objection, mais y avait donné son assentiment, ne s'étant jamais pourvu à cet égard contre le dit John Boston, mais au temps de telle vente par décret, y avait acquiescé.

Le Demandeur admit qu'il était présent lors de la vente et adjudication à Boston des lots en question, et les Défendeurs produisirent le Bref d'exécution émané contre les meubles du Demandeur à la poursuite du dit Boston, avec le Procès-Verbal de *nulla bona* signé par le dit Demandeur, avec son consentement sous croix, en présence de témoins, aux fins de procéder à la saisie de ses immeubles.

En cet état, la cause fut plaidée le 30 décembre, 1851, et le 13 janvier, 1852, en prononçant le jugement, DAY, Juge, dit : — Tous les faits étant admis, il s'agit d'examiner les informalités, et de voir si elles sont de nature à vicier la vente. Je dois dire d'abord qu'en France, aussi bien qu'ici, toutes les objections fondées sur des informalités sont regardées bien défavorablement, et que la règle suivie par les Cours est de maintenir, plutôt que d'infirmer, les procédures judiciaires, et c'est pour obéir à cette règle que les moindres actes sont pris pour des renonciations (*waivers*) à se prévaloir de ces informalités. Dans le cas actuel, les informalités invoquées sont au nombre de quinze, mais peuvent être réduites à un plus petit nombre, comme suit : 1. Pas d'élection de domicile par l'huissier au temps de la saisie. En effet il n'appert pas qu'aucune telle élection ait été faite, mais si on en appelle à la pratique de cette Cour, on voit qu'il a été invariablement jugé qu'elle n'était pas nécessaire. Il n'en est pas ici comme en France, où chaque huissier agit de son chef en exécutant les saisies. Ici, le shérif est l'officier, et son bureau est le domicile élu pour toutes les parties, et le saisi ne

peut ignorer où aller faire le paiement, s'il veut le faire, et c'est là la raison d'une élection de domicile, on l'a toujours ainsi décidé ici et aussi à Québec, ainsi que j'en suis informé par mon savant confrère (VANFELSON,) et quand il n'en aurait pas été ainsi, je serais prêt à le juger de cette manière à présent. La Cour, en conséquence, n'a point de doute que ce moyen n'est pas soutenable. 2. Pas de commandement de payer. Il n'est pas douteux qu'en France c'était une nullité qui viciait la saisie réelle. Ici, nous sommes sous l'effet du changement introduit par l'ordonnance de 1785, qui prescrit la saisie des meubles et des immeubles par le même exécutoire ; c'est donc évidemment une seule et même exécution, et quoique, dans ce District, on les ait séparées, ce n'est que comme plus grande facilité. Ici, le procès-verbal contre les meubles du Demandeur actuel, constate la demande de payer, qui est suffisante, sans qu'il soit nécessaire d'en faire une seconde. 3. Absence des recors ou témoins à la saisie. Il n'est pas besoin de s'étendre sur cette objection, vu qu'on a déjà plusieurs fois déclaré que tels recors ou témoins n'étaient pas nécessaires. L'ordonnance de 1667 les requérait pour la saisie des meubles, il est vrai, mais lors de son enregistrement en ce pays, cette partie en fut retranchée. En France, cette omission emportait la peine de nullité, parceque l'Edit de contrôle, qui n'a jamais été en force ici, exigeait la présence de recors. 4. Le procès-verbal ne fait pas voir si la saisie a été faite avant ou après-midi. Cette formalité n'a jamais été observée ici, et le manque de cette formalité n'était pas, nonplus, une cause de nullité en France. Plusieurs causes de nullités, il faut le remarquer, n'ont jamais été prononcées par les lois, mais ont été introduites par le silence ou la jurisprudence des tribunaux, ou par l'ingénuité des procureurs qui les invoquaient en toute occasion.

En fait de pratique, j'adopterais l'autorité de Pothier de préférence à toute autre, même à celle de Mr. Biret. Pigeau, en

son premier volume, p. 700, note (a), dit : “ on ne voit aucune loi ni règlement qui oblige à exprimer l'avant ou l'après-midi dans la saisie réelle.” Mais, quand même cette cause de nullité aurait existé en France, une pratique contraire, en ce pays, a eu l'effet d'abroger la jurisprudence française.

5. Le procès-verbal n'exprime pas le montant de la dette. Le warrant et le procès-verbal doivent être pris ensemble, et cette objection, dans ce cas, se trouve dénuée de fondement.

6. Pas d'élection de domicile du Demandeur. Les observations sur la première objection s'appliquent à celle-ci. En France, l'élection de domicile n'avait lieu que lorsque le créancier saisissant ne résidait pas au même lieu, que le débiteur, mais aucun texte spécifique ne faisait une nullité de cette omission. Pigeau p. 701, note (a), dit : “ aucune loi ne l'établit directement.” Ce n'était pas une loi, mais une simple pratique des tribunaux. Trois ou quatre autres objections sont relatives aux annonces et publications de la vente ; le rapport du shérif, alléguant qu'il a procédé à la vente, après avoir dûment fait les annonces et publications, est suffisant jusqu'à ce qu'il ait été mis de côté sur une contestation en forme. Mais il y a un autre moyen plus sérieux, et qui a occupé davantage l'attention de la Cour, c'est que le procès-verbal ne fait pas voir que copie en a été signifiée au Défendeur. Le certificat de l'huissier porte qu'il en a signifié “ une copie au Défendeur *en la laissant sur la terre ;*” c'est là évidemment un rapport impropre, ou plutôt ce n'en est pas un, et c'est une omission d'une formalité essentielle, parceque le Défendeur devait être informé que sa propriété était saisie : mais admettant même cette irrégularité, on ne voit pas que le Défendeur n'a pas reçu cette copie, et il ne le dit pas lui-même. Mais ici se présente une autre question. Il ne peut y avoir de doute que, sous le système français, toutes les formalités de la saisie pouvaient être mises en question jusqu'au *congé d'adjuger* ou *l'appointement* à décréter, ainsi que l'appelle Pothier : s'il

était fait quelque chose de nature à annuler les procédés, le Défendeur devait en donner connaissance, et à défaut par lui de le faire, et le *congé d'adjuger* prononcé, il était pour toujours forclos du droit de se prévaloir de telle nullité. On s'est demandé si nos lois, en simplifiant la procédure du décret, et dispensant de la formalité du *congé d'adjuger*, y avaient substitué quelqu'autre mode pour forclore le Défendeur du droit d'invoquer les nullités qui pourraient se rencontrer dans la saisie ? La Cour est d'opinion que tel moyen existe, et qu'on trouve dans le statut une indication de procédés équivalant, pour cet effet, au *congé d'adjuger*. Par la 38e section de l'ordonnance de 1785, prescrivant la manière dont le shérif devra procéder sur les ventes d'immeubles, il est déclaré, que la vente par le shérif, "sans autre formalité, aura la même force et "effet que le décret avait auparavant." Vient ensuite le statut de la 41e Geo. 3, ch. 7, dont la 11e section porte "qu'aucune opposition afin d'annuler &c., ne sera reçue "par le shérif, à moins que ce ne soit avant les quinze jours "qui précéderont immédiatement le jour fixé pour la vente " &c., pourvu que le shérif ait fait savoir, dans ses annonces "de vente des immeubles, que telles oppositions ne seront "pas reçues durant les quinze jours précédant la vente "comme susdit." Ceci me semble établir, comme règle, qu'un temps est donné aux parties, qui ont à se plaindre d'irrégularités dans les procédés, pour produire et faire leurs oppositions, et que dans la vue de les protéger, la loi a imposé au shérif l'obligation d'annoncer qu'après ce temps, aucune opposition ne serait reçue. Elles sont, par là, mises en demeure, et si elles laissent expirer ce terme, elles sont forclosées pour toujours. Rien ne peut être plus précis que l'expression du statut, et si ce n'était pas l'intention de la législature d'établir une règle de cette espèce, il n'en est établie aucune. Nous tenons donc que ce statut, joint à l'ordonnance de 1785, a établi un procédé équipollent au *congé d'adjuger*, et par

lequel une partie ne peut venir réclamer après l'expiration du délai, et que l'informalité, en dernier lieu mentionnée, est couverte par le délai expiré, de même qu'elle l'aurait été en France par le *congé d'adjuger*. Il faut qu'il y ait un temps limité pour invoquer les irrégularités ; dire que la prescription seule peut donner un titre sur adjudication du shérif, serait ouvrir la porte à toutes sortes de difficultés. Mais la Cour est disposée à aller plus loin, en disant que, dans la supposition où le statut ne serait pas assez positif, le Demandeur actuel, vu sa présence à la vente et adjudication de ses immeubles, devait se pourvoir en nullité de décret, et ne pas laisser prendre possession de ses biens, et attendre huit ou neuf ans pour venir ensuite, par une simple action pétitoire, sans égard à son expropriation, dont il ne fait pas plus mention que si elle n'eut jamais existée, demander la restitution de sa propriété. Si les principes de l'équité, et la convenance (*policy*) de maintenir les procédés des Cours, autant qu'il est possible, doivent avoir du poids, la demande en cette cause ne peut certainement pas être reçue.

MONDELET, Juge : Je concours à ce jugement dans toute son étendue ; mais si ces objections avaient été faites avant la vente, j'aurais été disposé à les accueillir, même celle qui regarde l'élection de domicile, considérant qu'elle est nécessaire, l'huissier, sur une saisie immobilière, n'ayant pas autorité de recevoir paiement.

SMITH, Juge : J'aurais renvoyé la réponse du Demandeur sur un *demurrer*.

Le jugement est motivé comme suit :

The Court, &c. Considering that the land and premises, in the Plaintiff's Declaration described, were seized under a Writ of Execution, issued upon a Judgment rendered in favor of John Boston, Esquire, against the said Antoine Boyer, the now Plaintiff, and after having been advertised and published

according to Law, to be sold, as appears by the Return of the late Honorable Roch de St. Ours, then Sheriff, upon the said Writ of Execution, were, on the 13th day of April, 1839, by the said Sheriff, sold and adjudged to the said John Boston, in the manner alleged and set forth in the Exception by the Defendants, in the said cause, pleaded ; and considering that the pretended informalities and nullities by the Plaintiff in his special answer in the said cause filed, assigned and alleged to have occurred in the said seizure, in so far as the same are shewn to exist, occurred in proceedings had and taken previously to the fifteen days next before the day fixed for the said sale and adjudication, and that the said Antoine Boyer, the now Plaintiff, notwithstanding the advertisements and publication of sale aforesaid, whereby he was duly notified and put *en demeure*, failed to make and file any Opposition *afin d'annuler*, at any time previous to the said fifteen days next before the day fixed for the said sale and adjudication, or any Petition *en nullité de décret*, or to take any other proceeding for causing the said seizure, sale and adjudication to be annulled and set aside, by reason of the said pretended informalities and nullities, and that by reason thereof and by law, he cannot now set up and oppose the said pretended informalities and nullities, and have the benefit thereof in manner and form as he has sought to do by his said special answers, doth dismiss the said special answers ; and the Court declaring, that by reason of the said seizure, sale and adjudication, the said Antoine Boyer, the now Plaintiff, was dispossessed of and lost his title, right and property, in and to the said land and premises, and that the said John Boston, became by virtue thereof, the owner and possessor of the said land and premises, doth maintain the said Exception of the Defendants, and dismisses the action of the Plaintiff with costs.

DRUMMOND et LORANGER, pour le Demandeur.

BETHUNE et DUNKIN, pour les Défendeurs.

COUR SUPERIEURE.—QUEBEC.

Présents : BOWEN, Juge-en-Chef, et DUVAL, Juge.

No. 271 { TESSIER, *Demandeur*,
 de { vs.
 1850. { TESSIER, *Défendeur*.

Jugé, qu'un curateur à une succession vacante ne peut pas être poursuivi par un tiers auquel il aurait transporté sa créance contre telle succession ; le curateur ne pouvant se poursuivre lui-même, ou se faire poursuivre par son propre cessionnaire.

Held, that a curator to a vacant estate cannot be sued by a third party to whom he has assigned his claim against such vacant estate ; inasmuch as the curator cannot sue himself or be sued by his own assignee.

Jugement rendu le 12 mars, 1850.

Le Défendeur avait été nommé curateur à la succession vacante du nommé Blais. Il était lui-même créancier de cette succession ; ne pouvant se poursuivre lui-même, il céda sa créance au Demandeur, qui intenta contre lui, en sa qualité de curateur, une action pour recouvrer la créance ainsi cédée. Le Défendeur fit défaut.

Cette action fut déboutée sur le principe, que la cession ayant eu lieu depuis la nomination du curateur, c'était de sa part en quelque sorte se poursuivre lui-même ; que dans ce cas, son seul remède était de renoncer à la curatelle, et de faire nommer un autre curateur. Ce jugement n'est pas motivé. (1)

TESSIER, pour le Demandeur.

(1) 12 V. c. 38, s. 36.

COUR SUPERIEURE.—QUEBEC.

Présents :—DUVAL et MEREDITH, Juges.

No. 269 de 1851.	{	GUENETTE,.....	<i>Demandeur,</i>
			vs.
		BLANCHET,.....	<i>Défendeur,</i>
			et
	{	ROY et AL.,.....	<i>Opposants,</i>
			et
	{	BOUTIN,.....	<i>Adjudicataire.</i>

Jugé, que tout Opposant, partie à un décret, peut demander la folle enchère contre l'Adjudicataire qui n'a point payé son prix d'acquisition.

Held, that any Opposing Creditor can move a *folle enchère* against an *Adjudicataire* who has neglected to pay his purchase money.

Jugement le 20 décembre, 1851.

Les Opposants, Roy et autres, ayant fait motion pour folle enchère contre l'Adjudicataire, (le nommé Boutin,) qui avait négligé de payer son prix d'acquisition, on leur objecta que l'initiative de cette procédure appartenait au Demandeur seul, comme *Dominus litis*. La Cour rejeta cette prétention, et accorda la folle enchère sur la demande des Opposants. Jugement non motivé. (1)

CHAUVEAU et CASGRAIN, pour Roy et autres.

TASCHEREAU, J. T. pour Boutin.

(1) 41 Geo. 3, c. 7, s. 14.

QUEEN'S BENCH, } DISTRICT OF QUEBEC.
 APPEAL SIDE.

Before ROLLAND, PANET and AYLWIN, Justices.

No. 811 } WURTELE,.....*Appellant*,
 of } and
 1851. } THE BISHOP OF QUEBEC,.....*Respondent*.

Held, that a judgment of the Superior Court, refusing to grant a Writ of *Mandamus*, upon a Petition complaining that the Bishop of Quebec has refused to read the funeral service over the dead body of an individual, is a final judgment, and may be appealed from, according to the provisions of the 12 V. c. 41, s. 20.

Jugé, qu'un jugement de la Cour Supérieure, refusant l'émanation d'un Writ de *Mandamus*, sur requête exposant que l'Evêque de Québec a refusé de lire le service funebre sur le corps d'un défunt, est un jugement final, dont il y a appel, aux termes de la 12 Vic. c. 41, s. 20.

Judgment rendered the 17th January, 1852.

The Appellant had presented a Petition in the Court below, complaining that the R. R. G. J. Mountain, Lord Bishop of Quebec, had refused, though duly requested so to do, to read the funeral service over the body of his deceased infant child, and prayed that a Writ of *Mandamus* should issue. The prayer of the Petition was rejected by the judgment rendered in the said Court, on the 18th September, 1851, by BOWEN, Chief Justice, BACQUET and MEREDITH, Justices.

That judgment is as follows :—

The Court having heard the Petitioner Christian Wurtele, and the Right Reverend George Jehosaphat Mountain, Lord Bishop of the Diocese of Quebec, and Rector of the parish of Quebec, in the same Diocese, by their Counsel respectively, upon the Petition of the said Christian Wurtele, in this cause filed, praying that a Writ of *Mandamus* do issue in the said

cause, and having seen the affidavit of the said Christian Wurtele, in this cause filed, by which it appears, that the said Christian Wurtele, on the twenty-sixth day of July last past, notified and required the said George Jehosaphat Mountain, as such Rector of the said Parish of Quebec, to open the Parish Church of the said Parish, at the hour of eight of the clock in the forenoon, on Monday, the twenty-eighth day of the said month of July, or at such hour as the said George Jehosaphat Mountain might, at the time of the making of the said requisition, indicate, and there read, over the deceased infant child of him the said Christian Wurtele, the funeral service, as prescribed by the Book of Common Prayer of the Church of England. And considering that the said George Jehosaphat Mountain was not, and is not, bound to comply with the said request, on the part of the said Christian Wurtele—It is ordered, that the prayer of the said Petition be, and the same is hereby dismissed with costs.

The Petitioner carried this Judgment into Appeal ; upon which, the Respondent moved that the Appeal should be dismissed, on the ground that the Judgment was not, by its nature, final and appealable.

On behalf of the Respondent, it was said that the Judgment was not appealable ; that it was a Judgment rendered as upon a Rule, the Petition required by our Statute being nothing but the motion made in similar cases in England ; that the Writ of *Mandamus* was not issuable as a matter of right, but left to the discretion of the Judges of the Court applied to ; that the Appellant had complained that the Respondent had refused to read the funeral service over the body of his infant child, and had not shewn a legal obligation in the Respondent to do so ; that the mode of burial was a matter purely of ecclesiastical cognizance, and not within the jurisdiction of Civil

Courts ; (1) that as to the plea to the Petition, spoken of in the Prov. Stat : it meant what is called in England the return to the Writ of *Mandamus*, after it has issued ; that this enactment of the Statute was a mere blunder, a piece of unskilful machinery, notwithstanding which, the proceedings must necessarily continue to be regulated by English Rules : that the Appellant having altogether failed to show, in the Respondent, the omission to fulfil a civil duty, the Writ had been properly refused.

It was contended, on the behalf of the Appellant, that the Judgment was made appealable by 12 V. C. 41, s. 20 ; that the Court below had decided the case upon its merits, and rendered a final Judgment ; that the Prov. Stat. had altogether changed the mode of obtaining the remedy by Writ of *Mandamus*, and that by the 11th sec., the Writ must issue, *de plano*, upon Petition showing a *prima facie* case ; that the obligation to read the funeral service is a civil obligation (2) ; that the Court below had taken the merits of the case into consideration, without plea and answer, and upon a motion decided the whole case ; that a Writ ought to have been granted, and the Respondent compelled to plead to the allegations contained in the Petition ; that the matter of civil obligation and duty spoken of, was a matter of proof to be hereafter established in various ways, as by the production of the Letters Patent appointing the Respondent ; that in England there was no Appeal in the case of a Writ of *Mandamus* being refused, but not so by the Prov. Statute ; that there was in Canada a Church Temporalities Law concerning the Church of England, imposing several civil obligations.

ROLLAND, Justice :—The Statute 12 Vict. ch. 41, has altered the remedy given in England, and used up to the period of its

(1) 2. B & A. p. 806. King vs. Coleridge :—1. B. & A. p. 122, *Ex parte Blackmore*.

(2) Répertoire, vbo. Sépulture.

being passed in Canada, by means of the Prerogative Writ of *Mandamus*, by directing how the matter shall be proceeded with in all cases, as it is said, in which a Writ of *Mandamus* will lie and might be legally issued in England. This must be considered as indicating cases in which no other remedy could be looked for ; and the Statute expressly provides, that every application shall be made by a declaration or petition, (*requête libellée*) supported by affidavit, to the satisfaction of the Court or Judges to whom the application is made, setting forth the facts of the case whereupon it would be lawful for the said Court or Judges to issue the Writ of *Mandamus*, and it directs that the Defendant shall not be allowed to shew cause otherwise than by answering or pleading to such declaration or Petition, &c. &c.

That there cannot be two interpretations given to the Statute, is evident.

Then by the 20th clause, it is said that an Appeal shall lie to the Court of Queen's Bench, from all final judgments in such matters.

The application here appears to have been made in the form directed, and the regularity of the proceedings was the only question to be the subject of consideration. Yet the Court, on the first presentation of the Petition, refused the allowance of the Writ, and that upon grounds evidently touching the merits of the application : and now, on an appeal brought, a motion is made to dismiss the appeal on the ground that the judgment rendered is not appealable.

Although, this Court is, no doubt, to consider this objection when the case comes for judgment on the appeal, it was contended that the objection might be made, *in limine*, by a motion such as the present. On this, I had some doubts, not having before me the Ordinance of 1787, I thought that it might be regular, but I can see nothing in the Ordinance to

justify it ; otherwise it might be made on every appeal instituted before this Court, a proceeding which cannot be admitted. If we were to grant the motion, we would thereby dispose of the merit of the appeal on motion.

It is said that the Judges of the Superior Court have set aside the law by refusing to comply with its injunctions, and here it is that I have an objection to enter into the merits of the application before the Court below ; I am of opinion we cannot do so on motion. We would fall into the same error in which it is said the Court below has fallen. All we could do in this summary mode of enquiry, would be to say whether or not the application was of that irregular nature that the Judges were authorized in rejecting it, and so, to prevent enquiry into the case. But they have not rejected it on account of its irregularity. It was a case, where, to use the words of the law, a Writ of *Mandamus* might issue in England. The affidavit appears to contain the necessary statement of facts, nor was irregularity or incompetence the ground of dismissal. But the Judges assumed that they had a right, as in England, to grant the Writ, or to refuse it in their discretion, an idea which we cannot adopt, for it is contrary to the express directions of the law, which says, that the Defendant shall not be allowed to show cause otherwise than by answer and pleadings, and that the like proceedings shall be had on all such applications for a Writ of *Mandamus* as are provided, in the Act, for the determination of other cases. A contrary interpretation nullifies the Statute. But all we can say now, without determining the merits of the Appeal, (which we must avoid,) is, that the judgment, final as it is, must be and is appealable. The motives or reasons assigned by the Court below, we will only try or determine upon hearing the Appeal. The only plausible argument, in my mind, was, that there was actually no case before the Court in which the judgment could be appealed from, for that the case was not there introduced, because of the refusal of the Judges to allow

its introduction. But without saying that the Judges were in error, (which we may say hereafter) we are certainly not prepared to say that there is no remedy against such a decision, and if there is, the Appeal is the only remedy, as the judgment is final. However guarded we are in expressing an opinion as to the error committed by the Court below, it is to be regretted that, from what we must say our future decision may be somewhat anticipated. But the Respondent must attribute this to himself, by raising prematurely the question that we will have to decide on the merits of the Appeal. The Court below, in my opinion, could only reject the application for irregularity, which would not have been a final judgment. This they have not done, but have dismissed the application by refusing to grant the Writ, and this cannot be otherwise viewed than as an appealable judgment, and the Court is unanimous in that opinion.

AYLWIN, Justice :—At the time of the argument, my impression was against the Appellant : I had not then read the 20th Section of the Prov. Statute, 12 Vic. c. 41 : but this section is conclusive on the point. It gives a right of Appeal, in cases of *Mandamus*, from every final judgment. The judgment appealed from is unquestionably a final judgment. The Appellant has complained that the Lord Bishop of Quebec, has refused to read the funeral service over the dead body of his infant child, and alleged, and offered to prove, that there was a legal obligation on the part of the Lord Bishop to do so : his application has been refused, and he has therefore never been heard upon the merits of his application. That judgment is final, and may be compared to a judgment dismissing an action upon demurrer.

Motion overruled.

STUART, A. and PRIMROSE, for Appellant ;

BLACK, for Respt.

SUPERIOR COURT.—MONTREAL.

Before DAY, SMITH and MONDELET, Justices.

NO. 2500 { MACKINTOSH *et al.*,..... *Plaintiffs*,
of { vs.
1852. { DEASE,..... *Defendant*.

Held, 1st. That where an Executor, whose powers have been extended by a Testator, beyond a year and a day, has become insolvent, and is making away with the estate, the Court will interfere to deprive him of the control of the property, and oust him from his office: and 2d. That the Court has no power to appoint a sequestrator.

Jugé, 1. Qu'un Exécuteur testamentaire, dont les pouvoirs sont prolongés au-delà de l'an et jour, qui est devenu insolvable, et qui dissipe les biens de la succession, peut être déchu par la Cour de l'exécution testamentaire et de l'administration des biens délaissés: et 2d. Que la Cour dans ce cas n'a pas le pouvoir de nommer un séquestre.

Judgment rendered 13th January, 1852.

. Action by a Minor, assisted by his Tutor *ad hoc*, against an Executor, to oust him from office, to account, &c. &c.

The declaration alleged that the late W. Mackintosh, in his lifetime of Lachine, departed this life in February, 1842, leaving three minor children, of whom Duncan Mackintosh, the Plaintiff, was one: that by his last Will and Testament, he appointed the Defendant, and one James Keith, Executors to his said Will, together with the Plaintiff, when he should have attained the age of Twenty-one years, "and did thereby declare his desire that the powers of the said Executors should not cease or expire at the end of one year and a day, as limited by law, but that the same should continue and be vested in them as such Executors, until the entire execution and accomplishment of the said last Will and Testament."

That the Testator, at the time of his decease, was possessed of real and personal estate of the value of £15,000, the whole

of which, after deduction made of certain legacies, he bequeathed to his two sons, William Mackintosh and Duncan Mackintosh, the Plaintiff, or the survivor of them, when they should respectively attain the age of 21 years, and in case they should die without issue, then to his daughter, Sophia Mackintosh, and her heirs ; that of the estate so bequeathed to his two sons, between £7000 and £8000 consisted in Hudson's Bay and Bank Stock, which Stock and the funds or securities to be purchased therewith, the said Will directed " should be paid and transferred to the said William and D. " Mackintosh, respectively, when they should respectively " attain the age of 21 years, and that the interest, accruing " therefrom in the meantime, should be applied towards their " education and maintenance, respectively, until they should " attain the said ages, respectively : " that the Defendant alone accepted of the office of Executor, the said Keith having renounced : that the Defendant had possessed himself of all the estate, real and personal, of the Testator ; that William Mackintosh, one of the minors, died in 1842, and that the Defendant was afterwards appointed Tutor to the two surviving minor children, and Donald Mackintosh, of Rivière-a-Delisle, Sub-tutor ; that Sophia Mackintosh had long since attained the age of majority, and that on the fifth day of November last, the Plaintiff, being still a minor, contracted marriage with Agnes C. Bonacina, and thereby became emancipated, and the Tutorship of the Defendant became and was thereupon determined : that at the time of the making of the Will, the Defendant was reputed to be a person of wealth, but that for a long time past he had been insolvent, affording no security for the fulfilment of his obligations as Executor : that he had failed to make and cause to be registered an inventory of the estate and property of the Testator, whereby the rights and mortgages of the Plaintiffs, and other legatees, had been lost and extinguished, and jeopardized : and further, that he had appropriated to his own use, large sums of money belonging to the estate :

Conclusion : 1. That the Defendant be condemned to render an account, and, in default, to pay the sum of £15,000 : 2. That he cause a true and faithful inventory of the said estate to be made and registered : 3. That he be ousted and divested of his said office, and of and from all further administration of the said estate and property : and 4. That a sequestrator and receiver be named and appointed, in due form of law, in the place and stead of the Defendant, to administer the said estate and property, until the Plaintiff shall have attained the age of majority.

Pleas : 1. *Défense au fonds en droit*, on the ground that it is not alleged, in the Declaration, that the marriage of the Plaintiff, a minor, was contracted by and with the consent and advice of his Tutor, or of a *conseil de famille*, or of any person authorized for that purpose ; that consequently the said marriage is null and void, and the Plaintiff was not emancipated, and the Tutorship of the Defendant thereby determined ; and further, because, a Sub-tutor, existing by law, whose duty it is to assist the Minor in case of difference with his Tutor, no reason is given, in the declaration, why the said Sub-tutor is not joined in the present action, instead of John Norton, the Tutor *ad hoc*.

By his 2nd and 3rd Pleas, the Defendant set up substantially the same matter by way of exception.

Issue was joined on the *Défense au fonds en droit*, and demurrers filed to the exceptions.

The whole of the Defendant's Pleas were dismissed on hearing, and a motion to file additional Pleas having been rejected, the Plaintiff proceeded *ex parte*, in which state the case came up for judgment.

DAY, Justice : The Defendant's Pleas having been disposed of, on demurrers, the chief question which remains is,

whether the Court can give a judgment depriving an Executor of his office? the Defendant has obtained possession of all the property, real and personal, of the Testator: as regards a certain portion of the property—shares in the Hudson's Bay Company and the Bank—a clause in the will vested it in Dease till the Minors had attained the age of 21 years, in order that it might be invested for their advantage: but as regards the rest of the property, there is nothing to show that the Defendant's powers, under the Will, were prolonged beyond the year and a day. This extension of power does not confer on the Defendant any equitable or legal estate in the stock—it does not make him a Trustee, but merely continues him Executor. Now the Plaintiff married at 18, and the Defendant has fallen into an insolvent condition, and has made away with a large portion of the estate of the Minor: the question then which comes up is this,—whether it is competent to this Court, notwithstanding the terms of the Will, to deprive the Defendant of his control of the property? and although some doubts were entertained on this point, at the time of the argument, the Court is satisfied, on consideration, both by general reasoning and from special authority, that it has this power. The office of Executor is simply a *Mandat*: the Executor is the *Mandataire* of the Testator, and the only difference between him and the ordinary *Mandataire* is, that instead of rendering account to his principal directly, he renders it to his successor. Applying this, we think the Court has the power to afford relief (1). As to that part of the conclusion, which asks that the Defendant be condemned to make an Inventory, we cannot grant it, nor is there any mode by which it could be enforced; also, as to the appointment of a Sequestrator, the Court is

(1.) 4 Ferrière, Grand Coutumier, p. 281, No. 6:—Brillon, *Dict. des Arrêts*, vbo. *Exécuteur*, p. 217, No. 11:—N. Denisart, vbo. *Exécuteur Testamentaire*, sec. 2, No. 6:—Dalloz, vbo. *Exécuteur Testamentaire*, Nos. 39, 40.

against the Plaintiff: the Minor having the right to take the property, the appointment of a Sequestrator would be useless.

SMITH, Justice, concurred. The remedy is according to our laws. I would not, however, be understood to express an opinion that, on a question respecting the powers of an Executor, appointed under the English form of will, the Custom of Paris is the proper authority to refer to.

The following is the judgment :

The Court considering, &c. &c., doth adjudge and condemn the Defendant, within two months from the service upon him of this judgment, to make and render to the said D. Mackintosh, Legatee under the last Will and Testament of the said W. Mackintosh, a true, faithful, and exact account, under oath, of all and every the estate and property, real and personal, goods, monies, securities, stocks, chattels and effects, which have come into his hands, possession, custody and power, as Executor of the said last Will and Testament, and of his care and management thereof, and of all and every the debts, sums of money, rents, issues and profits of the said property, real and personal, moveable and immoveable, received by him the said Defendant, at any time during his said gestion and administration, and of all debts, claims and demands which have been and were due to the said late W. Mackintosh, at the time of his decease, and the assumption by the Defendant of his said trust of Executor aforesaid, or which have become due to the said estate and succession, and generally of the affairs and business which he the said Defendant was, in virtue of his said trust, invested with the management, and by law is accountable and responsible for; and that the said Defendant do accompany the said account with all books of accounts, papers and vouchers in support thereof: and the Court doth oust and divest the said Defendant of his said office and trust of Executor, and of and

from all further administration of the said estate and property ; and the Court doth condemn the Defendant to pay the costs of this suit : and as to the conclusions by the said Plaintiffs in their said declaration taken—that a Sequestrator and Receiver be named and appointed, in the place and stead of the Defendant, to administer the said estates and property bequeathed and devised as therein mentioned, until the said Duncan Mackintosh shall have attained the age of majority,—the Court, considering that it cannot, by law, accord or order the naming and appointment of such Sequestrator and Receiver, doth dismiss the said conclusion, and so much of the action and demand of the Plaintiffs as relates thereto : and doth also dismiss all and every the other conclusions by the Plaintiffs in their said declaration taken, and not herein-before adjudged upon : reserving to the Plaintiffs, nevertheless, the right to take such other and further conclusions as they may be advised.

DEVLIN, Attorney for Plaintiff.

GUGY, for Defendant.

CIRCUIT COURT.—QUÉBEC.

Before DUVAL, Justice.

No. 100, } LAMPSON.....*Plaintiff*, ..
 of }
 1851. } BARRET.....*Defendant*.
 vs.

Held, that according to the provisions of the 12 Vic. cap. 38, sec. 79, a Writ of *saisie-arrest*, after Judgment, may be made returnable in vacation, if it issue in an appealable case.

That it is the duty of the Bailiff executing such Writ, to deliver it on or before the return day, either to the Attorney or party from whom he received it, or to file it in the Office of the Clerk of the Court into which it is returnable, although he was not specially requested so to do.

That having received such Writ as Bailiff to execute the same, he will not be permitted to urge the want of proof, in the record, of his being a Bailiff.

That the proof of the amount of the debt due by the *Tiers-saisi* to the Defendant, of the Attachment of it in the hands of such *Tiers-saisi*, and of the payment of such amount to others than the Plaintiff, the Plaintiff's Judgment remaining unsatisfied, is sufficient to entitle the Plaintiff to recover damages to the extent of the amount due by such Garnishee, without direct evidence of the Defendant's insolvency.

Jugé, que d'après les dispositions de la 12 Vict. ch. 38, sec. 79, un Writ de *saisie-arrest*, après jugement, peut être rapporté en vacance, si tel Writ émane dans une cause appelable.

Qu'il est du devoir de l'huissier de délivrer tel Writ, le ou avant le jour du rapport, soit au procureur ou à la partie qui le lui a remis, ou de l'enfiler au Bureau du Greffier de la Cour dans laquelle il est rapportable, quand même il n'en a pas été spécialement requis.

Qu'ayant reçu tel Writ comme huissier, pour en faire la signification, il ne lui sera pas permis de soutenir qu'il n'y a pas de preuve qu'il soit huissier.

Que la preuve du montant dû par le *Tiers-saisi* au Défendeur, ainsi que de la saisie faite entre les mains du *Tiers-saisi*, et du paiement de tel montant à d'autres qu'au Demandeur, le jugement du Demandeur n'étant pas payé, est suffisante pour donner au Demandeur le droit de recouvrer des dommages jusqu'au montant dû par tel *Tiers-saisi*, sans qu'il soit besoin de preuve directe de l'insolvabilité du Défendeur.

Judgment the 29th November, 1851.

The Declaration complained that the Defendant being a Bailiff, the Plaintiff, at Quebec, on the 31st December, 1850, retained and employed him as such, and he the Defendant, as such Bailiff, for reward and fees, by law allowed him, to be paid him by the Plaintiff, when requested, and which the Plaintiff was always ready to pay when so requested,

received from him, the Plaintiff, a certain Writ of *saisie-arrêt* to be executed, addressed to all and every the Bailiffs of the Superior Court for Lower Canada, residing in the District of Quebec, by which Writ the Defendant, as such Bailiff, was commanded to attach all the sums of money, &c., in the hands of John Sharples, Garnishee, belonging to John Curtain, to the amount of £50 currency, to summon the said John Curtain and John Sharples, to appear in Court on a certain day, namely the 13th day of January, 1851, and to have then and there, to wit, on the said 13th day of January, 1851, before the said Court, the said Writ. That the Defendant received the said Writ, and promised to serve and execute the same, and to return and have the same before the said Court on the said 13th day of January, 1851, according to the command and exigency of the said Writ, and although it was his duty so to do, and although he did attach, under the said Writ, the sum of £29, which the said Sharples then owed to the said Curtain, in the hands of the said Sharples, he, the Defendant, did not return the said Writ on the said 13th January, 1851, but illegally retained the same in his own possession; by reason whereof the sum attached was paid over by the said Sharples to the said Curtain, and the Plaintiff was deprived of the benefit of the said seizure to his damage of £29.

To this action the Defendant pleaded: 1st. By a *défense au fonds en fait*; 2d. By *perp. ex. per. en droit*.

1. That the Plaintiff caused the Writ of *saisie-arrêt* to be issued without the ministry of an Attorney, and by reason thereof, and of the Plaintiff's ignorance of the practice of the Court, the said Writ was not returned into the said Court on the return day.

2. That it never has been the duty of the Bailiff to return such Writ into the Court, but to the person charging him with the execution thereof, and that the Plaintiff never

demanded the same, although the Defendant was always ready to deliver it to him.

3. That when the Defendant undertook to serve the said Writ, the Plaintiff promised to call at the Defendant's residence for the said Writ, and the Defendant's return thereon, but neglected so to do.

4. That the Defendant undertook to serve the said Writ in consideration of certain fees which the Plaintiff did not pay, and that the Defendant was not therefore bound to return the said Writ previously to the payment of his lawful fees.

5. That on the return day of the said Writ, the Plaintiff, knowing the same was not returned into Court by reason of his own neglect, afterwards caused another Writ to be issued, and thereby attached, in the hands of the said John Sharples, the same sum of £50, and thereby freed and discharged him the Defendant from all liability arising out of his supposed neglect.

At the *enquête*, the issuing of the Writ of *saisie-arrêt*, the Defendant's certificate of service on the back of it, the amount attached in Sharples' hands due to Curtain, the non return of the Writ on the return day, the payment of the amount attached to Curtain by Sharples, in consequence of the non return, and the Defendant's subsequent offer to return the Writ after the return day, were proved.

ANDREWS, for Plaintiff: It was the Defendant's duty to return the Writ into Court, he is commanded by the Writ itself to do so; that is the instrument from whence he derives his authority, and if he acted at all under it, he was bound to yield obedience to it in all its particulars (1).

But the Defendant undertook to make this return, and the law would presume such an undertaking though not speci-

(1.) Stephen on Pleading, p. 20. (6th American Ed.)

fically proved, for the law implies a promise to do that which a party is legally bound to do. When the obligation is a legal one, the party who ought to discharge it is liable, although there be no previous request or subsequent promise. (1).

The sum demanded as damages has been seized and afterwards paid over by the Garnishee to the injury of the Plaintiff, who has thus, by the Defendant's neglect, been deprived of the benefit of the attachment made under the Writ issued by him, and suffered damage to the extent of the amount seized by him. The law will presume damage where the Defendant has been guilty of a breach of duty imposed upon him by law; the damages suffered by the Plaintiff may arise, either from his having been delayed in recovering his debt, or from his having lost it altogether, or from his being likely to lose it (2).

Where a party is entitled to a reward for the performance of his act, he is by law answerable for any degree of neglect on his part, the reward may be considered as an insurance for the due performance of what he has undertaken.

The Bailiff is strictly no agent of the Plaintiff, but he is the Officer of the Court, for the execution of its process, and must perform that which the Writ commands him, and if he do not, he is liable to the party for the damage caused by reason of his neglect, although he was not aware that it was his duty to return the Writ (3).

But that the Defendant knew it was his duty to return the Writ is evident, from his having offered so to do on a day

(1) 2 Starkie on Evid. Part 1, p. 727 :—Stephen on Pleading, p. 18.

(2) 2 Starkie on Evid. Part 1, pp. 299, 1014.

(3) 2 Starkie on Evid. Part 1, p. 727 :—14 East, 468, Slackford et al. vs. Austen :—3 Toullier, Brussels Edit. p. 109, Note 2, p. 110, Note 1 ; Ignorance de ce qu'on doit savoir, rend responsable : 5 Paris Edit. Note (2) to No. 389.

subsequent to the return day, when the Officer of the Court, whose particular duty it is to receive the returns, would not then receive it, because the return day was past.

VANNOVUS, for Defendant: The action has been brought for damage supposed to have been occasioned by the Defendant, in consequence of his neglecting to return into Court a Writ of *saisie-arrêt* placed in his hands, whereby the Plaintiff lost a sum of £29, which he, the Plaintiff, would have received, had the Defendant returned the Writ into Court. The Plaintiff's plaint rests upon the supposition that, had the Defendant discharged his duty perfectly, in respect of the Writ, the Plaintiff would have derived benefit from it. To establish satisfactorily that position, it is necessary to show that the Writ was a legal process, and one that might have issued, carrying with it all the penal consequences of a disobedience to the Mandate contained in it. If, on the contrary, such cannot be shewn, it is manifest to the least susceptible, that if no benefit were conferred upon the person at whose instance the Writ was issued, by the issuing of it, he cannot possibly have sustained a loss: hence it follows, that if the Writ of *saisie-arrêt* in this case was invalid, a right of action against the Defendant never accrued to the Plaintiff.

To render the position assumed by the Defendant intelligible, I will advert to the recent Judicature Act 12 Vict. ch. 38, by the provisions of which an extended jurisdiction has been given to the Circuit Court, and more particularly to the Section of the Act which settles the Terms of the Circuit Court in the Quebec Circuit. The Terms of the Court are held periodically on the six last days of every month (except August), where and when only the Court is in Session. The Writ, in the present instance, was issued and bears date on the 3rd January, 1851, and required the attendance of the *Tiers-saisi*, and the Defendant on the 13th January instant

before *the Court*; the *Tiers-saisi* to make his declaration upon oath, and the Defendant then and there to shew cause why the attachment should not be declared valid. The first question which claims attention is, whether there was a Court in Session on the 14th January, and if there was no Court on that day, will the parties enjoined by the Writ to do a given thing, be deemed contumacious for not yielding obedience to a Writ which, upon the face of it, requires an act to be done before a Court which was not in Session on that day, and which act (if the premises be true) could not be accomplished. The Defendant submits that the *Tiers-saisi* could not obey the Writ, *and cannot have incurred any penalty for neglect to attend*, because, there being no Court, he could make no legal declaration; and in the absence of any provision of law empowering the administration of oaths, I contend that either the Clerk of the Court, *ex officio*, nor any other person had the power to administer an oath to the *Tiers-saisi*, and if he did so, the oath would be illegal, and no penalty would attach if the matter sworn to were false (1).

I would also urge that the Plaintiff, having failed to show that Curtain is unable to pay the debt due by him, cannot maintain his action without proof of actual damage. (2).

Judgment for Plaintiff.

ANDREWS and CAMPBELL, for Plaintiff.

STUART and VANNOVUS, for Defendant.

(1) 20 Law Journal Rep : (N. S.) M. C. 197, Regina vs. Hallett.

(2) 4 Meeson & Welsby, 145 :—1 Meeson & Welsby, 709 :—5 Term Rep. 37 :—1 M. & Rob, 227.

COUR SUPERIEURE.—QUEBEC.

Présents : DUVAL et MEREDITH, Juges.

No. 145	PANET,.....	<i>Demandeur,</i>
	vs.	
de	LARUE,.....	<i>Défendeur,</i>
	et	
1851.	PANET et LARUE,.....	<i>Opposants.</i>

Jugé, qu'un contrat de mariage, assignant une rente viagère à la femme, doit être enregistré, pour lui conserver son rang d'hypothèque.

Held, that a contract of marriage, assigning a life rent to a wife, must be registered to preserve the right of mortgage according to the date of such contract.

Jugement le 13 octobre, 1851.

Dans cette cause, les biens dépendant de la succession de feu Wilbrod Larue, avaient été vendus, et il s'agissait d'en distribuer le produit entre divers créanciers hypothécaires. Parmi eux s'était présentée Dame Louise Badelard Panet, veuve du dit Wilbrod Larue, qui réclamait, outre des arrérages, un capital de £1,200, pour assurer le paiement à l'avenir d'une rente et pension viagère constituée en sa faveur par son contrat de mariage avec le dit Wilbrod Larue, en date du 24 mai, 1841, dans les termes suivants : “ Et en “ considération de l'amitié que le futur époux porte à la “ dite Dlle. sa future épouse, et pour lui assurer une existence honnête au cas qu'elle lui survive, il lui fait, par ces “ présentes, donation entre-vifs, pure et simple, ce qui est “ accepté par la dite Dlle. future épouse sous l'autorisation “ de ses père et mère, d'une rente annuelle et viagère de la “ somme de soixante-quinze livres courant, payable en deux “ termes égaux, laquelle commencera du jour du décès du “ dit futur époux et s'éteindra au décès de la dite future

“ épouse, et sera à prendre généralement sur les biens du dit
“ futur époux.”

Dans le projet de distribution préparé par le protonotaire, la Dame Lse. B. Panet, veuve Larue, n'était colloquée ni pour le capital de cette rente, ni pour ses arrérages, tandis que des créanciers hypothécaires postérieurs à la date de son contrat de mariage, et entre autres Charles Larue, dont l'hypothèque (duement enregistrée) ne remontait qu'au 6 mars, 1847, étaient mis en ordre de collocation et distribution.

En conséquence, la dite De. L. B. Panet, Ve. Larue, contesta ce projet de distribution, et entre autres la collocation du dit Charles Larue, alléguant que sa créance hypothécaire, datant du 6 mars, 1847, était postérieure à la sienne, qui remontait au 24 mai, 1841,—date de son contrat de mariage. Elle alléguait aussi que ce contrat de mariage avait été insinué du vivant de son époux, le 12 oct. 1849, et enregistré le 17 oct. 1849.

Il a déjà été dit que la créance hypothécaire du dit Charles Larue, remontait au 6 mars, 1847 : elle résultait de l'hypothèque produite par l'acte de tutelle, duement enregistré, nommant le dit Wilbrod Larue, tuteur à son frère, Charles Larue.

Sur cette contestation, les parties eurent une audition en droit.

Deux questions furent soumises à la cour :

1. Le contrat de mariage du 24 mai, 1841, portant la donation de cette rente viagère constituée en faveur de la De. Larue, ne devait-il pas être insinué, suivant la loi, dans les 4 mois de sa date ; et ce défaut d'insinuation ne pouvait-il pas être invoqué avec raison par le dit Charles Larue, nonobstant l'insinuation tardive faite le 16 oct., 1849 ?

2. La dite Dame Larue n'avait-elle pas perdu son rang d'hypothèque, à l'égard du dit Charles Larue, en ne faisant enregistrer son contrat de mariage que le 17 oct. 1849 ?

Le conseil de la Dame Larue soutenait—1. que l'insinuation faite du vivant du mari, le 17 octobre, 1849, avait été faite à temps ; 2. que d'ailleurs cette rehte viagère était un *gain de survie*, qui, à l'instar du donaire, n'était pas sujet à l'insinuation ; 3. qu'il n'était pas nécessaire, aux termes des Ordonnances et Statuts relatifs aux enregistrements, d'enregistrer le contrat de mariage, pour conserver à la femme ses avantages matrimoniaux, et notamment un avantage de cette nature ; il appuyait ces prétentions des autorités annotées au bas de la page. (1)

Le conseil de l'autre créancier, Chs. Larue, soutenait—1. que cet avantage était, dans les termes mêmes, une donation entre vifs, quoique le paiement ne dût être fait qu'après le décès du mari, et que conséquemment il était sujet à l'insinuation : 2. que ce n'était qu'un simple droit d'hypothèque, constituée et établie conventionnellement, comme le serait le préciput conventionnel établi par le code, dont la conservation et le rang dépendaient de l'enregistrement de l'acte qui l'avait constitué ; qu'évidemment, ces sortes d'hypothèques étaient de celles dont les Ordonnances et les Statuts exigent l'enregistrement. Il se fondait sur les autorités citées en note. (2)

Il soutenait que la décision citée de la Revue de Législation, n'était pas applicable, en ce que dans le cas cité, il

(1) 3 Revue de Jurisp. p. 478 :—L. C. Dénizart *vs.* Donaire, p. 169 :—6 Pothier, Des Donations, p. 473 :—L'Ordonnance de 1731. (Cette Ordonnance n'a pas été enregistrée, et n'a pas force de loi en Canada.) Guyot, Rep. de Jurisprudence, *vs.* Gains nuptiaux, p. 704 :—Idem *vs.* Insinuation, p. 279 :—3 Merlin, Quest. Dr. *vs.* Insinuation, pp. 656, 657.

(2) Rev. de Jurisp. pp. 299, 301 :—Ordonnance de Moulins, et l'Ordonnance de 1629 :—Guyot, Rep. de Jurisprudence *vs.* Insinuation, pp. 275, 276, 279 :—2 Bourjon, p. 127, c. 5, s. 3, Nos. 9, 10, 11 :—Ricard, Donations, p. 259 :—6 Pothier, Donations, p. 482 :—Actes de notoriété, pp. 12, 13, 51, 207 :—Louet, D, p. 277 :—5 Journal des Aud. pp. 23, 24 :—1 Argou, p. 291 :—4 Vict. chap. 30, sections 4, 21, 23, 29, 39.

s'agissait d'une réclamation pour *deniers dotaux*, et non d'un avantage assigné par le mari à la femme. Il était douteux d'ailleurs si la décision, sur laquelle on s'appuyait tant, était fondée en loi.

Le jugement qui suit porte que telle réclamation devait être enregistrée. La Cour n'a jugé que la question d'enregistrement.

Le jugement est comme suit :

La Cour.....vu le projet de distribution qui colloque divers opposants, et entre autres Charles Larue, considérant que la réclamation contenue en l'opposition de Dame Louise Badelard Panet est fondée sur son contrat de mariage avec Wilbrod Larue du 24 mai, 1841, et que ce contrat n'a été enregistré que le 17 octobre, 1849 ; considérant que les réclamations des autres opposants, et notamment celle de Chas. Larue, ont été enregistrées longtemps avant ; considérant que la réclamation de la dite Dame L. B. Panet est nulle et de nul effet quant aux créanciers susdits, déboute la contestation de la dite Dame L. B. Panet, avec dépens.

TASCHEREAU, J. T. pour la De. Larue.

BURROUGHS et TACHE, pour Chs. Larue.

LELIEVRE et ANGERS, Conseils.

COUR SUPERIEURE.—QUEBEC.

Présents : BOWEN, Juge-en-chef, DUVAL et MEREDITH, Juges.

No. 94,	}	GIBARD.....	<i>Demandeur,</i>
de		BLAIS.....	<i>Défendeur,</i>
1851.		DIVERS.....	<i>Opposants.</i>

vs.
et

Jugé, qu'un enfant, réclamant sa part mobilière de communauté dans la succession de sa mère, aura perdu son rang d'hypothèque sur les biens de son père, son tuteur, s'il n'a fait enregistrer le contrat de mariage, l'acte de tutelle ou le partage.

Held, that an Heir claiming his share of the moveable property of a community in the estate of his mother, will lose his rank of mortgage upon the real estate of his father, appointed his tutor, if he has not caused registration of the marriage contract, the act of tutorship or the deed of partition.

Jugement le 14 octobre, 1851.

Jean Baptiste Carrier et Dame Marie Victoire Blais, son épouse, réclamaient, sur le produit des immeubles vendus en cette cause, comme appartenant au Défendeur Jean Bte. Blais, la part mobilière de la dite Dame Marie Victoire Blais, dans la communauté qui avait existé entre ses père et mère, le dit Jean Bte. Blais, et Dame Victoire Gautron, et ce, par droit d'hypothèque résultant de leur contrat de mariage en date du 13 septembre, 1813, de l'acte de tutelle nommant le dit Jean Bte. Blais tuteur à ses enfants, en date du 2 novembre, 1826, et d'un certain acte de partage, en date du 8 mai, 1827 : tous ces actes non enregistrés. Le projet de distribution colloquait les dits J. B. Carrier et son épouse.

Le nommé Louis Blais, un créancier subséquent, réclamant en vertu d'un acte du 13 février, 1837, dûment enregistré, contesta cette collocation, prétendant que les dits

J. B. Carrier et son épouse avaient perdu leur priorité sur lui, par défaut d'enregistrement.

Ces derniers se fondaient sur la décision rendue dans la cause *ex parte* Gibb et divers Opposants, rapportée au 3 vol. de la R. de Jurisp. p. 478, pour prétendre qu'une hypothèque, résultant d'un contrat de mariage, n'a pas besoin d'être enregistrée pour conserver son rang.

Le jugement est comme suit :

La Cour, vu la contestation du rapport de distribution filé en cette cause de la part de Louis Blais, considérant que la réclamation de Jean Baptiste Carrier et Marie Victoire Blais, son épouse, mentionnée au quatrième item ou paragraphe de ce rapport, est fondée tant sur le contrat de mariage entre le Défendeur J. B. Blais et feu Marie Victoire Gautron, son épouse, fait et passé devant Mtre. Larue et témoins, le 18 septembre, 1813, que sur l'acte de tutelle du 2 novembre, 1826, nommant le dit Défendeur tuteur de la dite Opposante Marie Victoire Blais, et sur l'acte de partage en date du 8 mai, 1827, devant Mtre. Gosselin et son confrère, Notaires, entre Jean Baptiste Blais et ses enfants mineurs ; et considérant qu'aucun des susdits trois actes n'a été enregistré suivant la loi, et qu'à raison de tel défaut d'enregistrement, les dits Opposants Jean Baptiste Carrier et Marie Victoire Blais, son épouse, ne peuvent, en vertu d'iceux, réclamer un droit d'hypothèque sur les immeubles du Défendeur au préjudice ou à l'exclusion du droit d'hypothèque réclamé par l'Opposant Louis Blais, pour le paiement de la somme de £175 courant, et intérêt du 30 juin, 1848, due au dit Louis Blais, en vertu de l'acte d'obligation consenti en sa faveur par le Défendeur, le 30 juin, 1841, devant Mtre. Talbot et son confrère, Notaires, lequel acte d'obligation a été dûment enregistré dans le bureau d'enregistrement pour le District de St. Thomas, le 7 mars, 1843,—la Cour maintient la contestation filée par le dit Louis Blais au dit

Rapport de Distribution fait en cette cause, et ordonne que le dit Rapport soit amendé en conséquence.

GAUTHIER et LEMIEUX, pour J. B. Carrier, *et ux.*

CARON et BAILLARGÉ, pour Ls. Blais.

En décidant les deux causes qui précèdent, et quelques autres analogues, les Honorables Juges les accompagnèrent d'observations dont suit la substance :

BOWEN, Juge-en-chef : Je n'entretiens aucun doute que dans toutes ces causes, il était nécessaire de faire enregistrer les contrats de mariage pour conserver l'hypothèque : c'est ce qui a même été observé dans la cause *ex parte* Gibb, que l'on a citée. Dans ce dernier cas, Mde. Sheppard avait aussi réclamé une rente viagère, constituée en sa faveur par son contrat de mariage, mais elle ne fut pas colloquée pour cette rente, parceque son contrat n'avait pas été enregistré : la Cour fit une distinction quant à sa réclamation pour reprises de deniers dotaux, et colloqua la De. Sheppard, nonobstant le défaut d'enregistrement (1).

DUVAL, Juge, concourt dans l'opinion que toutes réclamations constatées et établies par un contrat de mariage nécessitent l'enregistrement. (2)

MEREDITH, Judge :—This case, Girard vs. Blais, and divers Opposants, and three other cases of the same nature, now before us, bring under the consideration of the Court, a number of questions of great interest, and of general importance ; and the remarks which I now propose to make, although they more particularly refer to the present case, will, I think, be found to explain sufficiently my views in relation to the other cases, to which I have alluded.

(1.) Il semble n'y avoir pas lieu à distinguer, et que les décisions rapportées ci-haut renversent la doctrine émise dans la cause *ex parte* Gibb.

(2) Nous n'avons pas les observations de l'Hon. Juge : nous les donnerons ci-après.

In this case, six of the collocations, contained in the report of distribution, have been contested, namely : the collocations Nos. 4, 5, 6, 7, 8 and 9. The collocations Nos. 4, 5 and 6, in favour of Marie Victoire Blais, Pierre Nolasque Blais, and Amable Blais, respectively, (the Defendant's children by his first marriage,) are founded on the same grounds ; and the collocations Nos. 7 and 8, in favour of Marie Adelaide Blais, one of the Defendant's children by his second marriage, and of the Defendant, in his capacity of Tutor to his other children, issue of his second marriage, are also founded on the same grounds.

The Opposants Marie V. Blais, Pierre N. Blais, and Amable Blais, by their oppositions aver, that by the marriage contract between the Defendant and his first wife, Victoire Gautron, a community of property was agreed upon between them ; that Victoire Gautron, having died, an inventory of the property belonging to the community thus established, was made on the 17 Nov. 1826 ; that a division of the property belonging to the community took place on the 8th March, 1827 ; that by this division, each of the said three Opposants became entitled to 617 *livres* ; and that the Defendant, as their Tutor, kept in his own hands, the sums of money thus belonging to them. The three Opposants then aver, that by reason of the premises, they have a mortgage on the Defendant's property sold in this cause, from the date of the said marriage contract ; and they pray to be collocated according to their hypothecary rights.

The Opposant Marie Ad. Blais, and the Defendant, as Tutor to the minor children issue of his second marriage, allege by their Oppositions, (in consequence of which the collocations Nos. 7 and 8 have been made) that by the marriage contract between the Defendant and his second wife, bearing date the 5th day of June, 1827, it was agreed that a community of property should exist between them, and that the wife should

have a conventional dower of £50; that by the same marriage contract it was declared, that the moveable property of the bride amounted to 4075 *livres*; with respect to which it was agreed "*la dite somme sortira nature de propre à elle et aux siens*"—and that the contract contained the usual clause giving the wife and her children a right to renounce their interest in the community of property thus agreed upon. The two oppositions now being spoken of, after reciting the last mentioned marriage contract, allege the death of the wife, the renunciation of the community by the children, and claim the said sum of 4075 *livres* mentioned in the marriage contract.

These two oppositions also claim another sum of money, but this additional claim is of a much less favorable nature than the others, which we think must be rejected; it is therefore needless to advert particularly to it.

The collocation No. 9, is for the conventional dower of £50, stipulated in the marriage contract between the Defendant and his second wife.

These six collocations are contested by Louis Blais, (who is an hypothecary creditor under duly registered deeds, bearing date prior to the coming into effect of the Registry Ordinance,) on the ground that the instruments upon which the contested claims are founded, have not been registered.

I shall, in the first place, advert to the contestation of the collocation No. 9, because that contestation brings under our consideration, in the most direct and general form, the question as to the necessity of the registration of marriage contracts in force at the time the Registry Ordinance came into effect.

This question, although certainly of great importance, I must say, does not, at least so far as regards claims for

conventional dower, and other such conventional hypothecary rights, appear to me susceptible of doubt.

The 4th section of the Ordinance, in the plainest terms, required that a memorial "*of all contracts and instruments in writing*," which should be in force on the day that that Ordinance came into effect, whereby any sum of money was secured, and whereby any lands were mortgaged, should be registered according to the provisions of the Ordinance.

The marriage contract in question was in force on the day that that law came into effect ; a sum of money, namely : the conventional dower of £50 was secured by it ; and lands, namely : the Defendant's lands sold in this cause, were hypothecated for the payment of that sum. Under these circumstances, it appears to me to be impossible to say, that the law did not require the registration of the marriage contract in question, unless we boldly assert that "*a marriage contract is not a contract or instrument in writing*." It is, I believe, universally admitted, that under the first section of the Ordinance, marriage contracts, hypothecating lands, made after the law came into effect, must be registered ; now it will be found that there is not one word in the 1st section relative to the registration of marriage contracts, which is not also to be found in the fourth section.

Those who admit that the first section does require the registration of marriage contracts made after the passing of the law, and who, nevertheless, contend that the fourth section does not require the registration of marriage contracts in force when the law came into effect, must maintain that the words "*all contracts and instruments in writing*," used in the first section of the law, do include marriage contracts, but that precisely the same words, when used in the fourth section, do not include marriage contracts.

I shall dwell no longer on this point, because I believe the Registry Ordinance, in so far as regards the obligation to

register all conventional hypothecary rights in force when the law came into effect, to be plain.

The observations which I have made, with respect to the conventional dower, which is the subject of the collocation No. 9, are applicable to the conventional *hypothèque*, which the children of the Defendant's second marriage claim for the payment of the sum of 4075 *livres* which is the subject of the collocations Nos. 7 and 8 ; and also to the conventional *hypothèque*, which the Defendant's children, by his first marriage, claim, for the payment of the sum of 617 *livres* each, due to them, respectively, under the unregistered deeds above mentioned.

It has however been contended, that the 4075 *livres* claimed by the children of the second marriage, is a dotal sum of money, and that the parties claiming it, have not only a conventional but also a legal *hypothèque* for the payment of that sum ; and that as the sum of 617 *livres* due by the Defendant, to each of the children of his first marriage, was retained by the Defendant in his capacity of tutor to those children, that they also have a legal *hypothèque* for the payment of the last mentioned sum of money. It is therefore necessary to ascertain, whether, as to the obligation to register, any distinction is to be made between legal mortgages and other mortgages, and this leads me to a difference between a phraseology of the first and fourth sections, which, although I believe, it was not adverted to at the argument, has presented considerable difficulty to my mind.

The first section requires the registration " *Of ALL privileged and hypothecary rights, claims and incumbrances, from whatsoever cause they may result, and whether produced by mere operation of law, or otherwise.*"

The fourth section does not thus particularize, but in general terms requires the registration " *Of ALL privileged and*

"*hypothecary rights and claims*" in force when the law came into effect.

As the first section, which is prospective, particularly refers to hypothecary claims produced by "mere operation of law," and as the fourth section, which is retrospective, does not do so, it has been thought that the Legislature cannot be supposed to have intended, that the general words "*ALL privileged and hypothecary rights and claims*," in the fourth section, should be interpreted so as to include legal *hypothèques*, that is to say, *hypothèques* established by law, without the aid of any agreement.

After giving to this most important subject due consideration, it appears to me that the law cannot be thus interpreted. There is, it is true, a difference between the words of the fourth section of the Ordinance, and those of the first section, but the difference is, I think, one of style only, and the words of the fourth section are as comprehensive as any that could have been used. The Legislature having declared that "*ALL privileged and hypothecary rights and claims*" in force when the law came into effect, should be registered, without making any exception, it is impossible for the Court to make an exception, by saying that legal hypothecary claims, in force when the law came into effect, should not be registered. Were the Courts to adopt this view, they would, at least for a long series of years, render the Registry system valueless; for the classes of claims, in relation to which no reliable information could be obtained at the Registry Offices, would be so numerous and important, that the information that could be obtained from the Registrars would be useless, or at least of such little value, that it could not be acted upon. (1) Doubtless the protection to which women

(1) Among the various classes of old claims with respect to which, under such a system, an applicant at the Registry Office could not count upon receiving information, are the following :

under marital authority and minors are entitled, might have been urged as a reason to induce the Legislature to provide further safeguards for their interests, or perhaps to have made an exception in their favor; but it will not justify us in endeavoring to evade the law for their advantage.

An exception, such as I have alluded to, has been made in France and in Louisiana, (2) but it has been made in both instances by a plain and positive provision of law, to which there is nothing whatever analogous to be found in our system, even as regards marriage contracts made after the passing of the Registry Ordinance.

The only argument that can, I think, be advanced to exempt the hypothecary claims of married women and minors, in force when the Registry Law came into effect, from the formality of registration, is that founded on the fact, that the fourth section of the Ordinance does not refer expressly to hypothecary claims produced by mere operation of law; but this argument cannot be confined to the claims of minors and married women; on the contrary, it applies as forcibly to all the other claims of legal mortgages, as it does to the hypothecary claims, in favor of wives, on the property of their

The mortgage of married women on the lands of their husbands for the restitution of dotal sums of money.

The mortgages of Minors on the lands of their Tutors.

The mortgages of interdicted persons on the property of their Curators.

The mortgage of minors on the property of persons who, without having been legally appointed Tutors to such minors, have acted as Tutors.

The mortgage on the lands of persons having entailed or substituted property, in favor of those for whose benefit the entail or substitution was created.

The mortgage for the warranty that subsists between copartitioners.

The mortgage that legatees have for the payment of their legacies.

The mortgages of builders, and for repairs made by them.

The mortgage of the sellers of real estate for the price remaining due to them.

5 Pothier, pp. 244, 245, 246.

(2) The Code of Louisiana Tit. 22, ch. 1, sect. 2. "of Legal Mortgages" art. 3280, declares "no Legal Mortgage shall exist except in the cases determined

husbands for dotal sums, or to those of minors on the property of their Tutors for the balances due upon the accounts of their Tutorships. If we hold that the Registry Ordinance did not require the registration of claims of the two last mentioned classes, in force when the law came into effect, we must, I think, also hold that the law did not require the registration of any legal mortgages in force when the law came into effect, and this wholly irrespective of the age or sex of the holders of those mortgages; and if we hold this, we render the law not only useless, but worse than useless. It would have been but of little use, to offer to protect capitalists against conventional and judicial mortgages, unless they could, at the same time, be protected against legal mortgages. A person, proposing to invest his funds in real estate, would derive but little encouragement from the information that he might rest secure as regards judgments and notarial obligations; if he were at the same time told that, as regards the legal mortgages in favor of builders, sellers of real estate, legatees, minors, married women and many others, he could know nothing.

For such a system of registration it would have been hardly right to subject the holders of conventional and judicial mort-

"by the present Code":—art. 3282, gives a Legal Mortgage to minors on the property of their tutors:—art. 3287, gives the wife a Legal Mortgage in certain cases upon the property of her husband. The 29th section of our Ordinance contains similar provisions in favor of minors and married women. But a provision contained in the Code of Louisiana to which there is nothing analogous in our law, will be found in the art. 3298 of the Code of Louisiana by which it is declared that "a mortgage exists *without being recorded* in favor of minors"—"on the property of their tutors." And also that

"The mortgage of the wife on the property of her husband for her dotal rights does also exist *without being recorded*."

There is no such exemption from the obligation to register created by any part of our law.

On reference to the articles 2121 and 2135 of the Code Civile, it will be found that there is the same difference between that Code and our Ordinance, that there is between the Code of Louisiana and our Ordinance. The Legislatures in France and Louisiana have expressly exempted minors, and married women in certain cases, from the obligation to register certain claims. Our Legislators have made no such exemptions, and it must be presumed, that in this most important matter they acted advisedly and after due deliberation.

gages to the expense and trouble, and to expose them to the risk, entailed upon them by the Registry Ordinance.

Notwithstanding these considerations, I confess that it is not without much hesitation and reluctance, that I arrive at a conclusion, which tends to place, or I should rather say, to leave, a class of claims, which doubtless are entitled to the most favourable consideration, in jeopardy. It is however to be borne in mind, in addition to the legal reasons already adverted to, that were a contrary doctrine to prevail, it would defeat the rights of many, and throw doubts over the titles of all of those, who have invested their capital upon the faith of the Registry Ordinance.

In a contest between the holder of an unregistered legal mortgage, which was in force when the Registry Law came into effect, and a subsequent *bond fide* purchaser of the mortgaged premises, the latter might justly say: when I bought the property from which it is now sought to evict me, I knew the Registry Law required that all privileged and hypothecary claims, in force when the law came into effect, should be registered; subsequently to that law coming into effect, and after the repeated delays allowed by law had elapsed, I ascertained that no claims had been registered against the property in question; I therefore felt secure, and invested my capital on the faith of the plain terms of a legislative enactment; this enactment, the legal tribunals of the country, cannot now render nugatory to my prejudice, by declaring that the clear and comprehensive words, all privileged and hypothecary rights and claims, include two only, of the three classes of hypothecary claims known to the law.

The matter appears to me to reduce itself to this: The Legislature has expressly declared, that *ALL privileged and hypothecary rights and claims*, in force when the Ordinance came into effect, whereby any sum of money was

secured, and whereby any real estate was hypothecated, should be registered, under pain of being inoperative against any subsequent hypothecary creditor for valuable consideration.

The hypothecary claims now contested were in force when the Ordinance came into effect; sums of money were secured by them, namely, the sums of money for which the Opposants have been collocated; and real estate, namely, the lands sold in this cause, were mortgaged for the payment of those sums of money; and yet the hypothecary claims in question were not registered as required by law. The Opposant Louis Blais, a subsequent *bond fide* hypothecary creditor for valuable consideration, by his contestation, prays that these unregistered claims may be held to be inoperative as against him, and it appears to me that we cannot reject his contestation without disobeying the clear terms and defeating the plain object of the law.

QUEEN'S BENCH, } DISTRICT OF QUEBEC.
IN APPEAL.

Before ROLLAND, PANET and AYLWIN, Justices.

No. 1217 } MALONE.....*Plaintiff, Appellant,*
of } and
1851. } TATE.....*Defendant, Respondent.*

Held, that a Defendant cannot be compelled to appear, before the return of a Writ of Summons, to show cause why certain witnesses, about to leave the Province, should not be examined; that depositions taken in such case before appearance of Defendant, and return of summons, are illegal; that the Inferior Court, before adjudicating upon the merits, ought to have determined as to the validity of such evidence, so as to afford the party an opportunity of substituting legal evidence in lieu thereof; that under such circumstances the party, whose evidence has been rejected, be allowed to re-open the *enquête*.

That inasmuch as the adverse party did not move, *in limine*, to reject such evidence, each party shall pay his own costs.

Jugé, qu'un Défendeur n'est pas tenu de comparaître, avant le retour du Bref de Sommation, pour montrer cause pourquoi certains témoins, sur le point de laisser la Province, ne seraient pas examinés; que des dépositions prises en pareil cas sont illégales; que la Cour Inférieure, avant de juger le mérite, devait se prononcer sur la validité de cette preuve, afin de fournir à la partie le moyen d'y suppléer; qu'en pareil cas la partie privée de sa preuve, a droit de recommencer l'*enquête*.

Que la partie adverse n'ayant pas demandé, dès le commencement de la procédure, le rejet de cette preuve, chaque partie devra payer ses frais.

Judgment the 11th October, 1851.

The Plaintiff, on the 27th July, 1850, issued a Writ of Summons *ad respondendum*, returnable the 2d September, and at the same time presented a Petition to one of the Judges of the Superior Court at Quebec, in Chambers, for permission to examine as witnesses, certain persons who were about to leave the Province, and praying an Order upon the Defendant to appear, either in person or by Attorney, before the said Judge, on the 31st July, to shew cause, if any he had, against the allowance of the Petition.

The Writ, Declaration, Petition and Judge's Order, were served upon the Defendant by the Sheriff of the District of Montreal on the 29th July.

On the 31st July, **AHERN**, on behalf of the Defendant, appeared before the Judge in Chambers, (**DUVAL J.**) and shewed cause against the allowance of the Petition on three grounds :

1. That witnesses could not legally be examined in a cause before the Return of the Writ and Process *ad respondendum* ;

2. That witnesses could not be examined before issue joined ;

3. That no examination of witnesses could take place during the Circuit Court or during the month of August, in which, by law, (12 Vic. c. 38, s. 29) there are no *enquête* days.

HOLT, on the part of the Plaintiff, supported the Petition, and it was ordered that the witnesses should be examined, reserving to the Defendant any objections which he might have to the right claimed by the Plaintiff to examine such witnesses ; the Plaintiff, accordingly, examined several witnesses. **AHERN**, on the part of the Defendant, attending, but refusing to cross-examine.

The Writ was subsequently returned into Court, and the Defendant having pleaded to the action, issue was joined, and other witnesses were called on the part of the Plaintiff, as well as witnesses for the Defendant, at the *enquête*.

On the 3d December, after the *enquête* had been closed, the Defendant moved to reject the depositions of the Plaintiff's witnesses, examined by virtue of the Judge's Order above mentioned, and the motion was heard when the cause was argued upon the merits.

The Judgment of the Superior Court, rendered the 27th May, 1851, dismissed the Plaintiff's action with costs, *sauſ à se pourvoir*. Present: BOWEN, Chief Justice, BACQUER and DUVAL, Justices. This Judgment is as follows:

"The Court, &c., considering that the evidence adduced in this cause is not sufficient to establish the trespass alleged to have been committed, and that the Defendant is not by law responsible for the damage sustained by the Plaintiff, it is by the Court, now here, adjudged, that the Plaintiff's action be, and the same is hereby dismissed with costs; and it is further, by the said Court, adjudged, (Mr. Justice DUVAL dissenting), that the said action be and the same is hereby dismissed, *sauſ à se pourvoir*."

From this Judgment the Plaintiff appealed.

The following extracts from the Appellant's case contain the arguments used on his behalf, in support of his depositions taken before the Return day of the Writ:

To the first objection: *that a witness about to depart the Province cannot be examined before the return of the Writ and before issue joined*, may be opposed, both the letter and the spirit of the law and the course and practice of the Court, during a period of, at least, fifteen or twenty years. The 12th Section of the Provincial Ordinance 25 Geo. III, cap. 2, provides for the examination of witnesses in extraordinary cases. "In case of *sickness* and *where the witnesses cannot attend the Court*" after issue joined, the deposition may be taken by "any one judge, in the presence of the parties, Plaintiff and Defendant, or their Attornies, or in their or either of their absence, after due notice signified," the deposition to be taken in writing, to be signed and sworn to, and to be certified and recorded. Such is the manner in which sick witnesses, or witnesses who cannot attend the Court, are to be examined. But the language of the Ordi-

nance is different with respect to witnesses about to depart the Province ; there is *no restriction as to time* ; the words are “ *in causes instituted* ” in the said Court, where “ any “ witness may be about to depart the Province, and by “ which means *either party* might be deprived of his testimony ; ” a cause is instituted by the issuing of the Writ, and it has been so invariably held, and the present case exemplifies how great a hardship a party might suffer, if, immediately upon the institution of his action, he were not permitted to call up his witnesses, without being compelled to await the expiration of the ten days which must necessarily intervene between the service and the return of the Writ. The latter clause of the 12th Section does *not* say “ *at the time* and in the manner as above expressed ” but only “ *in the manner* as above expressed,” and there is nothing, in the whole Section, to warrant the interpretation that a witness about to depart the Province cannot be examined before issue joined.

In answer to the second objection, it is sufficient to observe that an examination, upon Petition, of a witness about to depart the Province, is not the ordinary *enquête* ; the cause has then no place upon the Roll *des enquêtes*, which is called over only on *enquête* days ; and if the objection were good, the last six days of every month (during which the Circuit Court sits) would be, as well as the month of August, *dies non* as to evidence, and thus, during a period *exceeding three months* (97 days) in the year, a party might be deprived of testimony affecting his most important interests.

With respect to the third objection, that the witnesses themselves do not say that they are about to leave the Province, the Appellant submits that it is, equally with the others, without foundation. A reference to the 12th Section of the Ordinance above cited will shew that the *intended departure* and probable deprivation of testimony, are “ to be

ascertained *by affidavit* ” and the Plaintiff’s Petition, containing these necessary averments, was supported by his oath, in the usual way.

The following Judgment was, on the 11th October, 1851, rendered by the Court of Queen’s Bench, sitting at Montreal :

“ The Court of Queen’s Bench, considering that the Writ and Declaration in this cause were served upon the said Respondent, the Defendant in the Court below, at his domicile in the City of Montreal, on the twenty-ninth day of July, one thousand eight hundred and fifty, and that the said Writ was made returnable, at the City of Quebec, on the 2d day of September then next following, and that on the same twenty-ninth day of July, a Petition of the present Appellant, Plaintiff in the Court below, was also served upon the said Respondent at his said domicile, with an Order of one of the Judges of the Superior Court, that the said Respondent should appear, in person or by Attorney, at Quebec, on the thirty-first day of the said month of July, to shew cause why certain witnesses should not be examined on behalf of the said Appellant, then Plaintiff, Considering that there was no legal obligation, on the part of the said Respondent, to appear on the said last mentioned day, either in person or by Attorney, and that no legal default could be, as in point of fact none such was pronounced or entered, and that, on the said last mentioned day, an Order was made by the said Judge that the deposition of the “ witness,” meaning one witness, without naming him, should be taken, reserving to the Defendant, now Respondent, any objection to the Plaintiff’s, now Appellant, right of examining the said witness, and considering that, under color of the said Order, the Appellant proceeded to examine *ex parte*, on the said thirty-first day of July, James Prendergast and Terry Macane, on the first day of August following, Peter Lynch, John O’Neill,

“ John Coghlan and Robert Trainer, and on the eighth day
 “ of August, David Jones, as witnesses on his behalf, and that
 “ their depositions were reduced to writing, and filed and
 “ received in evidence, in the Court below, before the Return
 “ day of the Writ, and before the appearance of the Respon-
 “ dent by his Attorney, and that although application was
 “ made, in the Court below, by the Respondent, to set aside
 “ the aforesaid Judge’s Order, and to reject the depositions
 “ so taken for irregularity, no Order or Judgment was made or
 “ given thereupon, and that the Court below, notwithstanding,
 “ proceeded to render Judgment on the merits, before adju-
 “ cating upon the preliminary question as to the validity of
 “ the depositions so taken, whereby the Appellant has been
 “ deprived of the means of substituting legal evidence in
 “ lieu of the said informal depositions ; and considering that
 “ in so doing there was and is error, this Court doth reverse
 “ the final judgment in this cause rendered on the twenty-
 “ seventh day of May last, and proceeding to render such
 “ judgment as the Court below ought to have given, this
 “ Court doth hereby set aside the aforesaid Judge’s Order
 “ and the depositions and examination of the said witnesses,
 “ and doth order that the said depositions be struck from the
 “ files, and that the Record be remitted to the Court below,
 “ to the intent that the said Appellant be enabled to re-open
 “ the *Enquête*, and to proceed in due course of law to the
 “ examination of his witnesses and the adduction of evidence
 “ upon the issues joined and perfected between the parties,
 “ as if the said Judge’s Order had not been made, with
 “ liberty to the Respondent to join in such *Enquête*, and
 “ without prejudice to the evidence subsisting on the record,
 “ legally taken therein by the parties, in order that the Court
 “ below may proceed, after the adduction of such evidence,
 “ to do right and justice between the parties as to law and
 “ justice appertain. And this Court considering that the
 “ said Respondent, by delaying to move in the Court below

“for the rejection of the said depositions, until the second day of December, one thousand eight hundred and fifty, when the *Enquête* was closed, sought to deprive the Appellant illegally of his remedy to be relieved from the consequences of his informal proceedings, and that the parties, Appellant and Respondent, are both in default, in having participated in such irregular proceedings, it is ordered that each party do pay his own costs.”

HOLT and LEVINE, for Plaintiff.

AHERN, for Defendant.

QUEEN'S BENCH, } DISTRICT OF MONTREAL.
APPEAL SIDE, }

Present: ROLLAND, FANET and AYLWIN, Justices.

1851. { COPPS, Appellant,
 { and
 { COPPS, Respondent..

Held, that under the 12 Vict. cap. 38, sec. 85, it is necessary, in a *Défense au fonds en fait*, expressly to deny every fact alleged in the Plaintiff's declaration, otherwise such facts will be held, to be admitted.

Jugé, que sous la 12 Vic. chap. 38, sec. 85, il est nécessaire, dans une *Défense au fonds en fait*, de nier expressément chacun des faits allégués en la déclaration du Demandeur, autrement tels faits seront pris pour admis.

Judgment the 11th July, 1851.

This was an action brought in the Circuit Court at Quebec, by Joseph Copps, the Respondent, who alleged in his declaration that the Appellant was indebted to him in the sum of £33, “for the balance due to him for his services from the 10th December, 1849, to the 29th July, 1850, as the clerk and foreman of the Defendant at the rate of £6 10s.

per month, which was the value of his services, and which the Defendant promised to pay."

To this action the Defendant pleaded by peremptory exception alleging payment of the Plaintiff's demand, and also by *défense au fonds en fait* denying generally all the facts alleged by the Plaintiff, and particularly that "he (the Plaintiff) had performed any services of the value of £6 10s. per month or of any other value, and that he, the Defendant, did not undertake and promise in the manner and form alleged."

It was pretended by the Defendant, in the Circuit Court, that the evidence was insufficient, and that the Plaintiff's action must therefore be dismissed; the Court (DUVAL, Justice) was of opinion that the plea of payment was an admission of the demand, and judgment was therefore rendered against the Defendant for the full amount. On appeal to the Superior Court, the cause came before BOWEN, Chief Justice, and MEREDITH, Justice, who being divided in opinion, the judgment of the Circuit Court remained confirmed.

The cause was finally brought before the Court of Appeals, when, in July term, 1851, the Court, without pronouncing upon the question of the divisibility of the *aveu judiciaire* contained in the plea of payment, upon which point the case had been decided in the other tribunals, confirmed the judgment of the Circuit Court, (ROLLAND, Justice, dissenting) and assigned the following grounds for their judgment.

AYLWIN, Justice :—Though the amount claimed, in this case, is small, the principles involved are of the highest importance. The action is brought by a lumberman against his employer for wages earned by the Plaintiff, for bringing the Defendant's raft from Upper Canada to Quebec.

The Defendant pleaded payment by peremptory exception, and also filed a *défense au fonds en fait*, by which, after a

general denial of the facts alleged in the declaration, it was averred that the Plaintiff "performed no service for the Defendant of the value of £6 10s. per month." The majority of the Court give no opinion on the point whether a plea of payment admits the existence of the debt in such a manner as to exonerate the Plaintiff from proving it in the usual manner. I should have thought that the well known principle "*Qui excipit non fatetur*," left no room for difficulty on this head. But it is not necessary to enlarge upon this part of the case. The point here is as to the effect of the 12th Vic, cap. 38, sec. 85, on our system of pleading. That section enacts, "that in any pleading, in any contested civil case, every allegation of fact, the truth of which the opposite party shall not expressly deny, or declare to be unknown to him, shall be held to be admitted by him; and the costs of proving any such allegation of fact, or any document proved in evidence, shall always be in the discretion of the Court, so that the whole or any part of such costs may be awarded against a party denying or not admitting any fact or document, which, in the opinion of the Court, he must have known to be true or genuine, whatever be the event of the case." This section was intended to remedy a great and growing evil. Forms altogether unknown to our law and system of pleading have been introduced here; and among them that most dangerous plea, the general issue—and whilst recent legislative enactments in England, and Rules of Court in Upper Canada, have greatly mitigated the evil of the general issue, here we are exposed to all its mischievous effects. In England, it is understood only to cover certain particular points, and is limited to these. In Upper Canada, it is equally restricted in its effects, so as to narrow the issue as much as possible, to avoid embarrassment to the Plaintiff, and to save costs. And I hold that the object of our Legislature, in passing the 58th section of the Judicature Act, was to obtain this object. It is to be observed

that the law says "every allegation of fact, the truth of which the opposite party does not expressly deny"—evidently showing that the intention of the Legislature was that there should be a pointed denegation of each specific fact stated in the declaration, which had a tendency to obtain for the Plaintiff the judgment he demanded. Now in this case, we have a *défense au fonds en fait* in the usual printed form ; the printed part is certainly not within the Statute ; and as to the blank which the Defendant's Attorney has filled up in writing, it only denies that the Plaintiff ever rendered services to the Defendant of the value of £6 10s. per month. It does not deny that services were rendered, or that they were rendered at the time, or at the place alleged, but simply denies their value as alleged. Now, a large portion of these services were rendered in Upper Canada ; and to prove them, the party Respondent would have been obliged to sue out a *Commission Rogatoire* to Upper Canada. Had he done so, the Defendant might have said to him, I never denied the fact of the services having been rendered ; you have gone into unnecessary evidence, and must pay the costs yourself. I deem the section of the Judicature Act I have quoted above, to be one of the most wholesome and beneficial provisions of the existing law. I see in it an obligation upon Defendants to plead *de bonne foi*, to file substantial defences instead of deceptive pleas, which only mislead and confuse the adversary and the Judge. With the construction I put upon it, parties will go to law with their eyes open, and a full knowledge of what they will be expected to prove. With this construction, the question, does a plea of payment admit the debt ? could never arise. And, I trust, the Judges of Courts of original jurisdiction will see the necessity of applying *the whole* of the section ; that when parties shall have raised unnecessary and expensive issues, they will be mulcted in costs. If they do so, the result of this section will certainly be to improve

and simplify the administration of justice. 'But, though I do not claim the gift of prophecy, I do not hesitate to say, that the time is not far distant when the Legislature will find it necessary to do here what has been done in other countries—to proscribe altogether the mischievous plea of general issue. (1)

ROLLAND, J. : I should indeed rejoice to see the day to which my learned brother alludes. But, in my opinion, so long as we have general demands, we must expect to have general defences. I differ from the majority of the Court as to the interpretation of the Statute 12 Vic. c. 38, s. 85, or rather, as to what are *the facts* which must be “ expressly denied.” Now, we had before us this term, a case in which the Plaintiff demanded £2000 for ten years’ services as captain. The allegation of these services is not a single fact, but a vast number of facts, each year’s or month’s, or week’s service being a separate fact. Would it be necessary for the Defendant to deny specifically these separate facts? Would he be required to say that for the first week of the ten years no services were rendered, during the second week, the Plaintiff worked three days, and during the third week, the Plaintiff was drunk, &c. &c.? I can understand that, when the Declaration is precise and specific, or when it is drawn, for instance, on a promissory note, if the Defendant does not deny his signature, it is held to be admitted. But when the debt is based on a great variety of separate facts, I interpret the Statute to mean, that a general denegation is quite sufficient. In the *défense au fonds en fait* filed in this case,

(1) In the case of *St. John vs. Delisle*, which came before the Superior Court at Montreal, the same point as that decided in *Copps and Copps* arose, when the following observations were made upon judgment being rendered :

DAY, J. : The question is, whether the general answers to the exception pleaded are available. As to the case of *Copps and Copps*, to which the attention of the Court has been called, we do not agree with the Judgment of the Court of Appeals; and as the Chief Justice was absent when the Judgment in the case alluded to was rendered, and one of the Judges present dissented, we do not consider ourselves bound by the decision: we therefore consider the general denial in this case sufficient.

"all, each, and every one of the facts alleged in the Plaintiff's Declaration" are stated to be "wholly untrue and unfounded in fact and in law:" which I hold to be quite sufficient. The demand is general: and I cannot see how the defence can be otherwise than general. It will be borne in mind that, in the absence of the Chief Justice of this Court, as I differ in opinion from my learned brethren on this point, this judgment will not have the effect of settling the jurisprudence.

PANET, J., concurred with Mr. Justice AYLWIN, and remarked, that this point could not be considered as finally settled, by reason of the dissent of Mr. Justice ROLLAND, and the absence of the Chief Justice.

HOLT and IRVINE, for Appellant.

ALLEYN, for Respondent.

SUPERIOR COURT.—MONTREAL.

No. 346 and No. 645 of 1851.	{	THEBERGE, the elder,..... <i>Plaintiff</i> , vs. PATTENAUDE,..... <i>Defendant</i> .
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Held, 1. That a variance between the original Writ of Summons and a copy is a nullity which cannot be amended without the consent of the Defendant; and 2. that in such case, it is not necessary to inscribe *en faux* against the bailiff's return.

Jugé, 1. Que la non conformité de la copie avec l'original d'un Writ de Sommation est une nullité qui ne peut être amendée sans le consentement du Défendeur; et 2. qu'il n'est pas besoin de l'inscription de Faux à l'encontre du rapport de l'huissier en pareil cas.

In this cause, which came up on an appeal from the Circuit Court, the Plaintiff sued the Defendant in an action of damages for slander.

On the return of the action, the Defendant appeared and filed an *exception à la forme* on the ground "that there has been no legal service upon him of the original Writ of Summons, issued in this cause and returned into this Court, or of any other process or Writ wherein the said Pierre Théberge, *père*, is Plaintiff, but, that there has been served upon him a copy of a certain writ, purporting to have been issued at the instance of one Pierre Laberge, *père*, and annexed thereto a copy of a declaration, in which the Plaintiff is designated as Pierre Théberge, *père*," &c. &c. ; wherefore, he prays that the Writ or process issued in this cause, and the service thereof made, may be declared illegal, informal, and null and void, and be set aside and quashed."

On this, the Plaintiff moved to be allowed to serve a correct copy of the Writ of Summons on the Defendant, on payment of costs, which was granted by Mr. Justice McCORD, costs taxed at 20s.

The Plaintiff, having caused a correct copy of the Writ to be served on the Defendant, afterwards moved that the exception *à la forme* be dismissed, without costs, which motion was rejected.

The proceedings being in this state, the Plaintiff caused a demand of plea to be made on the Defendant, who, the same day, notified the Plaintiff to produce and file his answers to the Defendant's exception *à la forme*.

The Defendant not pleading within the delay, was foreclosed, and the Plaintiff proceeded to proof *ex parte*.

On the 31st December, 1850, Mr. Justice McCORD rendered judgment, condemning the Defendant to pay to the Plaintiff the sum of £12 10s. as damages, with costs.

From this Judgment the Defendant appealed, on the ground chiefly that the Court had no power to grant the

Plaintiff's motion to amend, by serving a copy of the Writ of Summons; that such service could not legalize the original service which was null; and that the Court could not proceed to adjudicate *ex parte* on the merits of the case, till the *exception à la forme* had been disposed of.

On the 24th February, 1851, in the Superior Court, present :

SMITH, VANFELSON and MONDELET, Justices.

The following Judgment was rendered :

“ Considering firstly, that the variance between the original Writ of Summons and the copy thereof, which, previously to the amendment ordered by the Court below, was and is fatal, *une nullité*, the copy of a Writ of Summons, together with the service of the said Summons, being and constituting an essential and an integral part of the *exploit de sommation*; considering secondly, that the Court below had and hath no right to alter *ex proprio motu*, or, upon the motion of the Plaintiff, unless assented to by the Defendant, to permit any such amendment as that which the said Court has permitted; thirdly, that the said Court below had not nor hath a right to supply such nullity, by ordering the service upon the Defendant of a copy of the original Writ amended, different from that which was, in the first instance, served upon the Defendant, the said first copy being an integral part of the *exploit de sommation*; fourthly, that the *exception à la forme*, in the said cause filed, hath not been adjudicated upon, and is still in its primary state, together with a demand for an answer thereto; fifthly, that the Court below hath wrongfully refused to grant the motion of the Plaintiff for an, adjudication upon the said *exception à la forme*, thereby placing beyond a doubt the fact that the said *exception à la forme* is still unadjudicated upon; sixthly, that the granting the Plaintiff leave to

“ proceed *ex parte*, in the above mentioned state of the record,
 “ is a *nullité de procédure* ; seventhly, that the Court below
 “ had no evidence of any amendment having been made, a
 “ pretended return upon the original Writ of Summons,
 “ which a bailiff presumed to make, without any authority
 “ for so doing, being an act which no Court of Justice should
 “ sanction ; eighthly, that in consequence of such irregula-
 “ rities and *nullités*, all the proceedings subsequent to the
 “ filing of the *exception à la forme*, in the Court below, are
 “ vitiated, irregular, illegal and null, as well as the judgment
 “ in the said Court below, rendered the 31st December,
 “ 1850 :—Wherefore, the said Court doth declare and adjudge
 “ all such proceedings irregular, illegal, null, and that, in
 “ respect thereof, and of the said judgment, there has been
 “ a *mal jugé*, and doth annul and set aside the same, and
 “ order that the Court below shall proceed, and cause the
 “ parties to proceed, as and from the filing of the said
 “ *exception à la forme*.”

Mr. Justice SMITH dissenting.

The record being remitted to the Court below, the Plaintiff, on the 28th February, 1851, filed answers to the *exception à la forme*, denying the allegations therein made to be true, and alleging moreover that, supposing the variance to exist, the Defendant could not invoke this nullity by an *exception à la forme*.

At the *enquête* the Defendant proceeded to examine the bailiff who served the Writ, as also the prothonotaries and their clerks, as witnesses, to establish the facts alleged by him in his exception. To this evidence the Plaintiff excepted, and afterwards moved to reject the depositions from the record, “ Attendu que le Défendeur n’avait pas le droit de
 “ faire entendre des témoins pour contredire le rapport fait
 “ par l’huissier de la signification de l’ordre, et qu’il ne

“pouvait attaquer le dit rapport que par une Inscription de faux, et que les faits, sur lesquels ont déposé les témoins; n'étaient pas susceptibles d'être prouvés par témoins.”

The parties having been heard on this motion and on the merits, judgment was pronounced by Mr. Justice GUY on the 31st July, 1851, maintaining the *exception à la forme*, and declaring the Writ of Summons to be null and of no effect, and in consequence discharging the Defendant from answering the Plaintiff's demand.

From this judgment the Plaintiff, in his turn, appealed on the grounds that the variance in the copy of the Writ was a mere clerical error, which had not misled the Defendant, seeing that he had actually appeared: and, (which was the principal ground relied on) that the bailiff's return could only be impugned by an *Inscription de faux*. (1)

The parties having been heard, judgment was delivered on the 27th October, 1851. Present, Judges DAY, SMITH and VANFELSON—confirming the judgment of the Inferior Court of the 31st July.

VANFELSON, Justice: The Court are clearly of opinion that the judgment of the Court below must be confirmed. In France, the duties of the *huissier* were, in respect to his return, very different from those of the bailiff in Canada: there, the *huissier* certified all the copies which he served, while here the bailiff merely serves such papers as are entrusted to him by others. He has nothing to do with certifying their authenticity, and the detection of any discrepancy between a copy and an original does not necessitate an *Inscription de faux*.

DAY, Justice: I concur with my learned brother in the view he has taken of this case. In France, the *huissier* was

(1) Authorities cited by Plaintiff, *Questions de Rodier* pp. 12 et 35.—*Carre* p. 362 et seq.

bound to examine and certify every thing; here the bailiff certifies nothing, but only serves whatever is put into his hands.

Judgment of the Court below confirmed.

CHERRIER and DORION, for Plaintiff.

CARTER and CARTER, for Defendant.

COUR SUPERIEURE.—QUEBEC.

Présents : BOWEN, Juge-en-chef, et MEREDITH, Juge.

No. 671,	GARNEAU.....	<i>Demanderesse,</i>
	vs.	
de	FORTIN.....	<i>Défendeur,</i>
	et	
1852.	DIVERS.....	<i>Opposants.</i>

Jugé, qu'un contrat de mariage exécuté avant l'ordonnance de la 4 Vic. c. 30, doit avoir été enregistré dans le délai voulu pour conserver son rang d'hypothèque.

Que le Demandeur dans une cause a droit d'être colloqué par privilège pour tous ses frais d'action, lorsque ces frais sont indispensables pour poursuivre la saisie et vente des immeubles d'un Défendeur.

Held, that a contract of marriage executed before the enactment of the 4 Vic. cap. 30, must have been registered in the delay fixed by the Ordinance, to preserve the rank of the mortgage created by it.

That the Plaintiff in a cause has a right to be collocated, by privilege, for all his costs of suit, when such costs are indispensably necessary to obtain the seizure and sale of the Defendant's real estate.

Jugement le 16 Février, 1852.

Les immeubles du Défendeur ayant été saisis et vendus, divers Opposants se présentèrent, réclamant d'être colloqués sur le produit d'iceux, et entre autres la Demanderesse, épouse du Défendeur, duquel elle avait été séparée quant aux biens, dans l'instance même, et à la poursuite de laquelle les biens avaient été vendus; elle réclamait, en vertu de son

contrat de mariage avec le Défendeur, exécuté par-devant notaires le 11 décembre, 1836, enregistré seulement le 10 décembre, 1849. Le procureur de la Demanderesse dans la cause, qui avait obtenu distraction de dépens, réclamait le montant qui lui était dû pour ses frais et dépens. Enfin, le nommé Louis Couillard Dupuis était Opposant, et fondait sa réclamation sur un acte de vente en forme authentique, consenti par lui au dit Défendeur le 13 avril, 1848, dûment enregistré le 5 juillet de la même année.

Par l'ordre de distribution préparé par le protonotaire et filé dans la cause, à la suite de certains créanciers qui la primaient, la Demanderesse fut colloquée, pour certaine réclamation résultant de son dit contrat de mariage. Ensuite le procureur de la Demanderesse était colloqué pour *tout* le montant de ses frais et dépens dans la cause. Ces deux collocations avaient l'effet d'empêcher que Dupuis ne fut payé de tout le montant qui lui était dû, et il contesta l'ordre de distribution filé en la cause.

Ses moyens étaient comme suit :

1. Parceque la collocation, contenue au 9me item du rapport de distribution, et les diverses sommes accordées à l'Opposante y dénommée, est fondée sur un contrat de mariage, exécuté devant Tessier et un autre, notaires, le 11 décembre, 1836, entre le Défendeur et la dite Opposante, enregistré le 10 décembre, 1849, et pour un préciput accordé au survivant des dits époux.

2. Parceque la collocation contenue au 10me item du dit rapport est pour frais encourus dans une action en séparation de biens entre la Demanderesse et le Défendeur, fondée sur le même contrat de mariage.

3. Parceque le dit contrat de mariage n'a été enregistré que le 10 décembre, 1849.

4. Parceque la réclamation du dit Dupuis est fondée sur un acte de vente, cité en son opposition afin de conserver, et filé en cette cause, consenti par le dit Dupuis au dit Défendeur, devant Gendron et un autre, notaires, le 13 avril, 1848, enregistré le 5 juillet, même année.

5. Parceque, en vertu du dit acte de vente, les immeubles du Défendeur sont hypothéqués en faveur du dit Dupuis, à compter du 5 juillet, 1848, date de l'enregistrement, et que le droit d'hypothèque de la Demanderesse et de son Procureur ne compte que du 10 décembre, 1849.

Les parties entendues sur cette contestation, le jugement suivant fut rendu :

La Cour, etc., considérant que le contrat de mariage de la dite Emilie Garnaud avec le Défendeur, fait à Québec devant Tessier et un autre, notaires, le 11 novembre, 1836, n'a été enregistré que le 10 décembre, 1849, et que par le dit rapport de distribution la dite Emilie Garnaud est colloquée pour la somme de £6 5s. montant de son préciput, au cas qu'il ait lieu, etc., etc. ; considérant que l'acte de vente par Louis Couillard Dupuis à Pierre Fortin, exécuté devant Gauvreau et un autre, notaires, le 13 avril, 1848, a été dûment enregistré le 5 juillet, 1848 ; considérant aussi que la Demanderesse a droit d'être colloquée, par privilège, pour tous ses frais d'action, etc., etc., comme étant les frais indispensablement encourus pour poursuivre la saisie et vente des immeubles vendus en cette cause, etc., etc., et qu'il a été accordé distraction des dits frais en faveur de U. J. Tessier, écuyer, procureur de la Demanderesse ; maintient la contestation du dit Dupuis quant à la collocation de la dite Emilie Garnaud ; et aussi la cour maintient la dite contestation de la collocation du dit U. J. Tessier, à l'exception de cette partie de la dite collocation qui a rapport à la partie des dits frais privilégiés sus-mentionnés.

GAUTHIER et LEMIEUX, pour L. C. Dupuis.

TESSIER, U. J. pour la Demanderesse.

SUPERIOR COURT.—QUEBEC.

Present: BOWEN, Chief Justice, DUVAL, Justice.

No. 272 { DINNING.....*Plaintiff*,
 of { vs.
 1851. { JEFFERY.....*Defendant*.

A guardian of goods and chattels seized under a Writ of Revendication addressed to the sheriff, has no right of action against the party at whose suit the Writ issued, for the recovery of the monies expended by him as such guardian in and about the safe keeping and custody of such goods and chattels.

Un gardien d'effets saisis en vertu d'un Writ de Saisie-Revendication adressé au shérif, n'a aucun droit d'action contre la partie à la poursuite de laquelle le Writ est émané, pour le recouvrement d'argents avancés par tel gardien pour la préservation et pour la garde des effets saisis revendiqués.

Judgment the 17th December, 1851.

The Plaintiff's declaration alleged, that on the 19th May, 1849, a Writ of Revendication was issued out of the Court of Queen's Bench for the District of Quebec, at the suit of the Defendant, against John Shaw and Richard Jeffery, which Writ was addressed to the Sheriff of the said District, who, in virtue thereof, seized and revendicated certain goods and chattels, in the said declaration mentioned, then being in the hands and possession of the said John Shaw and Richard Jeffery, and by the Plaintiff in that cause alleged to be his. That the present Plaintiff, Dinning, was, on the 21st May following, duly constituted and appointed guardian of the said goods and chattels, and accepted the charge; and that the same continued to be and remain in the charge and custody of him, the Plaintiff, as such guardian, until the 25th April, 1850, when they were delivered over to the said John Shaw and Richard Jeffery in virtue of an Interlocutory Judgment of the Superior Court. That it became necessary for the guardianship and safe keeping of these

goods and chattels, to expend large sums of money in and about the guardianship and safe keeping thereof; and that in fact, the Plaintiff had paid therefor the sum of £250 currency, which sum was still due and owing to him; and that the Defendant, being the party Plaintiff and actor in the revendication suit, was liable to pay Dinning that sum.

There was a second count for work and labor done, and materials provided for the Defendant, at the latter's request, (being the general assumpsit count).

The declaration concluded by praying that the Defendant be condemned to pay the Plaintiff the said sum of £250.

The Defendant demurred to the first count of the declaration, as being insufficient in law :

1. Because it was not alleged, nor did it appear, that any contract whatever had intervened, or was entered into, between the Plaintiff and the Defendant, in relation to the matters therein alleged.

2. Because it was not alleged, nor did it appear, that the Plaintiff, if, at any time, he was appointed guardian of the goods and chattels in question, was so appointed at the request or with the consent or knowledge of the Defendant.

3. Because it was not alleged, nor did it appear, that the Plaintiff, if he did, at any time, expend any sums of money in and about the guardianship of the said goods and chattels, did so expend the same, at the request or with the knowledge or consent of the Defendant.

4. Because the said first count disclosed no legal cause of action, nor was there any matter therein alleged, sufficient in law to render the Defendant liable to the Plaintiff.

In support of the count, the Plaintiff referred to Poth. Proc. Civile, 182, 183, and 2d Jousse, Com. Civ. p. 585, Tit. 33, Art. 10, s. 2.

JUDGMENT.—The Court, &c. considering that, in the first count of the Plaintiff's declaration, it is alleged that the Plaintiff was named guardian of divers goods, chattels and effects seized by the Sheriff of this District, in virtue of a Writ of Revendication issued at the suit of James Jeffery, the Defendant in this cause, against John Shaw and Richard Jeffery, and that there is due and owing to the said Plaintiff, Dinning, as such guardian, a sum of £250 currency, for the custody and safe keeping of the same, while under seizure in virtue of the aforesaid Writ of Revendication, for the recovery of which sum this action is brought; and considering that the said Defendant is responsible to the Sheriff of the District to whom the said Writ was addressed, as well for the payment of the fees allowed the said Sheriff, as for payment and reimbursement of all expenses and disbursements incurred by the said Sheriff in the execution of the said Writ; and that, by reason thereof, the Defendant is not bound to pay to the Plaintiff, the amount by him claimed as such guardian, doth maintain the demurrer in this cause filed by the Defendant, and doth declare that the allegations set forth in the first count of the said declaration, and the matters and things therein contained, in manner and form as the same are therein stated, are not sufficient in law to entitle the Plaintiff to have or maintain his action against the said Defendant, for the recovery of the sum of money in the said first count alleged to be due and owing by the Defendant to the Plaintiff, and in consequence doth dismiss the said first count of the Plaintiff's declaration, with costs.

HOLT and IRVINE, for Plaintiff.

POPE, for Defendant.

SUPERIOR COURT.—MONTREAL.

Before DAY, SMITH and MONDELET, Justices.

No. 2643 { HOWARD.....*Plaintiff*,
of { VS.
1851. { SABOURIN *et al.*.....*Defendants*.

Held, that in the case of protest of a note, dated at Montreal and payable at a Bank in Albany, in the State of New York, a notice of protest mailed by a Notary at Albany, addressed to an endorser at Montreal, (protest being made and notice mailed according to the laws of the State) is not sufficient, the postal arrangements between the two countries at the time, being such, that letters could not pass through the post without prepayment of postage from Albany to the line.

Notice sent to the endorser, at the place where the note was dated, is sufficient diligence: the place of abode being sufficient indication of the endorser's domicile, to warrant the holder in sending such notice, the endorsement being unrestricted.

Jugé, que dans l'espèce d'un billet daté à Montréal et payable à Albany, dans l'Etat de New York, l'avis de protest envoyé par la malle à l'endosseur à Montréal (le protest étant fait et l'avis mis à la poste suivant les lois de l'Etat) n'est pas suffisant, les arrangements entre les deux pays relativement aux malles ne permettant pas le passage de lettres, sans paiement préalable, d'Albany à la ligne entre les deux pays.

L'avis adressé à l'endosseur au lieu où le billet est daté, est une diligence suffisante, telle indication justifiant le porteur, lorsque l'endossement est sans restriction, de regarder ce lieu comme domicile de l'endosseur.

Judgment the 22d December, 1851.

Action against the maker, Picault, and against the endorser, Sabourin, the former described in the pleadings as of Montreal, the latter of Longueuil, on a promissory note, dated Montreal, 21st May, 1850, made by Picault, payable to C. Sabourin or order, at the Mechanics' and Farmers' Bank, Albany, for \$848.

The Defendants pleaded severally :

1. Want of Protest and Notice.

2. General Issue.

Admissions were given as to signatures. The Plaintiff, under a Commission Rogatoire addressed to Commissioners at Albany, examined the notary, who proved due protest of the note, and that at 45 minutes past 4 in the afternoon of the 23d of November, 1850, he put into the Albany Post Office a letter containing notification of protest, addressed "C. Sabourin, Montreal, Canada": that the word "Montreal" was written in pencil, in the hand-writing of Mr. W. McHench, one of the clerks of the Bank, under the name C. Sabourin, and that, in accordance with the usage of the State, he had mailed the notice addressed as above. Mr. McHench proved, that at the time the note was put into the Bank for collection by the Plaintiff, witness asked the Plaintiff where Sabourin resided, and was told at Montreal, which he accordingly marked on the note. Nicolas Hill, Junior, an Attorney and Counsellor at Law at Albany, proved the protest to be in conformity with the laws of the State of New York; and when asked as to the law of New York relating to notice, answered: "It is the duty of the notary, or person giving notice of protest, in cases like those mentioned in this interrogatory, to use due diligence in ascertaining where the endorser resides, and to serve notice accordingly. Service of the notice may be made through the mail, in the manner specified in the certificate of the notary in this case, provided the endorser does not reside in the same place where presentment or demand is made. If, in the exercise of due diligence, the person giving notice is informed that the endorser resides at a particular place, and sends notice accordingly, it will be sufficient to charge the endorser, though it may turn out that he resides at a different place. When the endorser resides out of the United States, and is not known to have any acquaintances at the place of presentment or demand, information obtained of the officers of the Bank where the note is payable, and of the holder, owner of the note, would, in my opinion,

"be sufficient to justify the sending of notice accordingly." Samuel Stevens, also an Attorney and Counsellor at Law, gave evidence to the same effect.

The Defendants were examined on *faits et articles*, but their answers were not made use of.

For the Defendants, Edward S. Freer, Post Office Inspector for Canada East, stated, that after the 16th November, 1847, the postal arrangements between Canada and the United States were such, that no letter could be transmitted from one country to the other, through the Post Office, unless the postage was previously prepaid to the frontier; and produced a circular from the Post Office Department to the Canadian Post Masters, giving instructions to that effect: also, that public notice of this order was given in the Canadian newspapers generally. Cross-examined, he stated, that his only knowledge of letters being stopped was derived from the newspapers. Another witness proved the advertisement in the newspapers of lists of unpaid letters stopped at Whitehall.

DAY, Justice: There is no question as to the liability of the maker. As to the endorser, Sabourin, the question is whether sufficient diligence has been used by the Plaintiff to entitle him to succeed against him. The obligation was to use reasonable diligence, nor was it necessary to show that actual notice had been given. Indeed, it is admitted that no notice of any kind reached the endorser. The notice to him was addressed to Montreal, although he is described in the Writ as of Longueuil. It is the opinion of the majority of the Court that this was sufficient. There is nothing in the endorsement to indicate his place of residence; the note is dated at Montreal, and the majority of the Court think this is a sufficient declaration of the endorser's domicile being at Montreal, to render it competent for the Plaintiff to direct his notice in the manner proved.

There is, however, another point in the case. The notice is proved to have been mailed at Albany in proper time, but nothing is said of postage having been prepaid. Now it appears that, at the time of notice being sent, there existed a postal regulation by which no letter could be transmitted beyond the frontier unless the postage was prepaid. This does not appear to have been done, and therefore the mailing of the letter gave it no more chance of reaching its destination than if it had been kept in the notary's pocket. The state of the postal arrangements was a public matter, of which the Bank and the notary at Albany could not be ignorant, and which they were bound to know: on this ground, therefore, the action, as to the endorser, must be dismissed.

MONDELET, Justice : It is made out to my mind that the notice could not have reached the endorser: I do not hold with the majority of the Court that the notice was sufficiently directed.

The following are the reasons of the Judgment, as regards the endorser: " And the Court, proceeding to adjudge upon the said action in so far as the same relates to the said Chas. Sabourin, the endorser of the said promissory note, considering that no notice was given to the said Chas. Sabourin, of the protest of the said promissory note, and that, inasmuch as by the arrangements established by public authority, and then existing between this Province and the United States of America, for the transmission of letters by mail, no letter was conveyed, or could be sent by mail, from the City of Albany, in the said United States, to the City of Montreal, in this Province, without prepayment of the postage thereupon being made to the frontier line of the said United States, and that such postage was not so prepaid by the Plaintiff, or on his behalf, at the time of so posting the notice of the said protest, addressed to the said Chas. Sabourin, in the post office at Albany, for transmission by mail to Montreal, and

that no reasonable or sufficient diligence and care were used and applied in and about the transmission of notice of the said protest to him, and that by reason thereof, and by law, the Plaintiff ought not to recover judgment against him in manner and form as by his said declaration he hath concluded, maintains the exception of the said Chas. Sabourin, and doth dismiss the action of the Plaintiff in so far as the same relates to the said Chas. Sabourin." (1)

A. and G. ROBERTSON, for Plaintiff.

DOUTRE and LENOIR, for Picault.

LAFLAMME, for Sabourin.

COUR SUPERIEURE.—QUEBEC.

Présents : BOWEN, Juge-en-chef, DUVAL et MEREDITH, Juges.

No. 659	{	LANGEVIN..... <i>Demandeur,</i>
de		vs.
		GARON..... <i>Défendeur,</i>
1851.		et
	{	H. GARON..... <i>Adjudicataire.</i>

Jugé, qu'après que la folle enchère a été ordonnée contre un adjudicataire, il peut y mettre fin, en payant son prix d'acquisition et les frais encourus sur la folle enchère.

Held, that after the *folle enchère* has been ordered against a purchaser, (*adjudicataire*) he may annul that proceeding by paying his purchase money, and the costs incurred on the *folle enchère*.

Jugement le 14 octobre, 1851.

Le nommé Henri Garon, s'étant porté adjudicataire des immeubles saisis et vendus sur le défendeur, n'avait payé

(1) Authorities referred to by Plaintiff's Counsel : Poth. Cont. de Ch. Nos. 148 and 150 :—3 Espinasse, 144 :—10 Peters, 572 :—1 Moody and Rob, 2 No. 484 :—1 B. and C. 245, 521 :—24 Wend. 358 :—2 Hill, 588 :—Storey, Bills, No. 387 :—21 Wend. 643 :—1 Ryan and M. 249 :—1 Selwyn, N. P. p. 902 :—Bell's Prin. No. 340.

qu'une partie de son prix d'acquisition. Deux Opposants firent motion pour folle enchère contre lui. Le 22 juin 1851, cette motion fut déclarée absolue, et la revente ordonnée. Subséquentement, l'adjudicataire prit des arrangements avec quelques-uns des créanciers colloqués, paya la balance de son prix d'acquisition entre les mains du shérif, et fit motion qu'il fut permis au shérif d'amender en conséquence son retour, et que la folle enchère fut rescindée et mise au néant, en par lui payant les frais. Les Opposants, qui avaient poursuivi la folle enchère, s'y opposèrent, sur le principe que l'adjudicataire ne pouvait plus se libérer de ce jugement. Le 14 octobre, 1851, intervint un jugement en faveur de l'adjudicataire, motivé comme suit : " Considérant qu'il appert que l'adjudicataire, Henri Garon, a pris des arrangements avec les créanciers colloqués pour retenir entre ses mains le montant de leur collocation, et qu'il a payé entre les mains du shérif la balance de son acquisition : considérant qu'il ne s'est rendu coupable d'aucune négligence grossière, la Cour permet au shérif d'amender son retour, etc., et rescinde et annule le jugement de folle enchère ordonnant la revente, avec dépens contre l'adjudicataire en faveur des Opposants qui ont poursuivi la folle enchère (1). (DUVAL, juge, *dissentiente*.)

MEREDITH, Juge : en prononçant le jugement de la Cour, dit :

In this case, the Court has to determine, whether it has the power to permit an *adjudicataire* to pay the purchase money due by him, even after an Order for the sale of the premises at his *folle enchère*.

It is true that d'Héricourt, (page 191) speaking of the sale *par décret*, says : *Cette vente conditionnelle est résolue de*

(1) Les Opposants citèrent le Nouveau Denizart, verbo Folle Enchère, page 698.

plein droit, quand la condition sous laquelle on l'avait faite n'est point exécutée de la part de l'acquéreur. The author does not, however, say, that the non-payment, within the exact time limited by the conditions, defeats the adjudication, and as a matter of every day occurrence, we know that it is not held to have that effect (1).

Pothier, Procédure Civ. p. 253, says : *Par le jugement qui ordonne que l'héritage sera recréé et adjugé à la folle enchère de l'adjudicataire, l'adjudication est rescindée.*

Pothier, at the same page, says that the *adjudicataire* may pay the purchase money at any time before the Order for a resale ; and, he adds, that he may pay even during an appeal from the judgment ordering a resale.

This, it appears to me, is an admission that the payment may be made after the judgment ordering the resale, provided it be made before the second adjudication ; for, if the judgment ordering a resale does set aside the previous adjudication, absolutely and forever, a mere undecided appeal could not give the Appellant a right directly opposed to the judgment appealed from. The opinion of Pothier must, I think, be understood as meaning that, if the judgment ordering a resale be carried into effect, it *necessarily* defeats the previous adjudication. Thus understood, it harmonizes with the remarks of Mr. Carré, vol. 6, p. 802 : “ De même qu'après l'adjudication sur saisie immobilière, le saisi a cessé d'être propriétaire, de même, *après l'adjudication sur folle enchère*, la première adjudication a été résolue, et le fol enchérisseur a cessé d'être propriétaire.” And in a note at the same page, we find these words : “ Nous ferons remarquer, que le principe de la résolution de la vente, par suite d'une nouvelle adjudication, est appliqué en

(1) The opinion of d'Héricourt is quoted by Pigeau, vol. 1, p. 783, and in L. C. Deniz. vol. 8, p. 693.

matière de sur-enchère." This writer evidently takes it for granted that the first adjudication is rendered inoperative by the second. Such is the view that, I think, ought to be adopted, and, I am therefore of opinion, that the Court has it in its power to permit an *adjudicataire* to pay the purchase money due by him, at any time before the carrying into effect of the order for the resale.

It may also be observed, that if a second adjudication of the property took place, at a price lower than that which the property brought at the first sale, the first *adjudicataire* would be liable to imprisonment until he paid the difference between the two prices; and it would certainly be very hard to hold a man liable for imprisonment, in the event of a sum of money not being paid, and yet to refuse to allow him to pay it.

Indeed, in the present case, the same party who resists the application of the *adjudicataire* to be permitted to pay the purchase money, has a rule before the Court, praying that the *adjudicataire* be committed to the common jail of this District for the non-payment of the same purchase money.

The judgment that we are disposed to render is in conformity with one pronounced by the Court of K. B. for the District of Quebec, in the case No. 909, of 1828, Quebec Bank vs. Black. In that case the *adjudicataire* was allowed to pay after an order for the resale at his *folle enchère*. It is true that the Plaintiff in that case consented; but if the sale of the Defendant's property had become absolutely null by a default on the part of the *adjudicataire*, a consent on the part of the Plaintiff could not be the means of resuscitating that sale. Moreover, in the present case, we have the consent both of Plaintiff and Defendant. I would merely add, that the *adjudicataire*, in the present case, is entitled to the favorable consideration of the Court. Before the taking of any rule against him, he paid a large portion of the purchase

money into the hands of the Sheriff, and he had made an arrangement with some of the mortgage creditors, which, he had reason to believe, would have relieved him from the necessity of depositing the balance.

For these reasons, I am of opinion that we ought to grant the application of the *adjudicataire*, on payment of all the expenses.

DUVAL, Juge : Je ne puis concourir dans le jugement de la Cour, car quel qu'ait été l'usage suivi jusqu'ici, l'autorité citée par les Opposants (N. Dén. vbo. *Folle Enchère*) est conclusive : quant à l'*adjudicataire*, qui a négligé de payer son prix d'acquisition, et qui, par là, a forfait aux conditions de son contrat, il n'a plus droit d'en demander l'exécution, et, quant à lui, ce contrat a été entièrement annulé par le jugement qui a ordonné la folle enchère.

TASCHEREAU, J. T., pour les Opposants.

TESSIER, pour l'*Adjudicataire*.

QUEEN'S BENCH, }
APPEAL SIDE.

DISTRICT OF QUEBEC.

Before ROLLAND, PANET and AYLWIN, Justices.

No. 56 { FILMER and others.. (*Plaintiffs in the Court below,*)
of { and *Appellants,*
1851. { BELL..... (*Opposant in the Court below,*)
Respondent.

Held, that a deed, by which it is declared that the payment made by a debtor, is so made with the monies of a third party, borrowed upon the condition of subrogating such party to the rights of the creditor, and that such declaration is made for the purpose of effecting such subrogation, (such third party not being present at the execution of the deed,) does not effect a subrogation in favor of such party, by reason of want of acceptance on his part, nor does the stipulation to that effect, with the debtor, effect such subrogation, by reason of the absence of an authentic instrument, as evidence of the loan and of its object, at a period anterior to the payment; also, that the allegation, in an opposition, of a parol contract, anterior to the payment, that the monies were loaned to the debtor, upon condition that the lender should be subrogated to the rights of the creditor, cannot be taken as admitted, although such opposition is not contested, upon the principle, that a contract of such a character could only be proved by an authentic instrument, which would render certain the period at which the loan was made; and lastly, that the acceptance, subsequently made by the lender, of the assignment of the rights of the original creditor, is inoperative to effect the subrogation, because the original debt was completely extinguished at the time of the payment.

Jugé, qu'un acte, dans lequel le débiteur déclare payer des deniers d'un tiers, tels deniers empruntés à la condition de fournir à ce tiers une subrogation aux droits du créancier, et que cette déclaration est faite aux fins d'opérer telle subrogation, (ce tiers n'étant pas présent à l'acte,) n'opère pas une subrogation par le créancier, par défaut d'acceptation de la part du tiers, et ne peut non-plus opérer une subrogation par la convention avec le débiteur, par défaut d'un acte authentique, constatant le prêt et la destination de tel prêt, antérieur au paiement; encore, que l'allégué, dans une opposition, d'une convention verbale antérieure au paiement, que les deniers ont été prêtés au débiteur par un tiers, à la condition de lui obtenir la subrogation aux droits du créancier, ne peut être considéré comme admis, quoique telle opposition ne soit pas contestée, sur le principe qu'il faut preuve de telle convention par acte authentique qui puisse rendre certaine la date du prêt; et enfin, que l'acceptation, faite après coup par le prêteur, de la cession des droits du créancier, est de nul effet pour lui obtenir la subrogation, sur le principe que la dette a été complètement éteinte à l'instant du paiement.

Judgment the 17th January, 1852.

This appeal was instituted from a judgment of the Superior Court, sitting at Quebec, maintaining a contestation,

filed by the Respondent, to a report of distribution and collocation drawn up and filed by the Prothonotary.

The real property belonging to the vacant estate of the late Honorable Matthew Bell having been sold under writs of execution sued out of the Court below by the Plaintiffs, the Respondent had filed an opposition, claiming to be collocated out of the proceeds of a lot of ground situated in St. Ursule street, in Quebec, by privilege of *bailleur de fonds*, for the sum of £750 and interest, due to him as representing and being subrogated to the original vendors of the lot in question. He rested his claim, *firstly*, on a deed of sale, dated 4th March, 1833, by which this sum of £750, balance of the purchase money, was made payable by the said Matthew Bell to the personal representatives of Mrs. Anne Pyke, one of the vendors, with privilege of *bailleur de fonds* on the property sold; *secondly*, on a deed of transfer, dated 13th March, 1844, by the said Anne Pyke and the other vendors, in favor of one Joseph Wenham, of this sum of £750, with all their rights and privileges respecting the same; *thirdly*, on a deed, dated 19th October, 1847, which, together with a fourth deed hereinafter mentioned, gave rise to the controversy between the parties in this cause: the question being, whether they lawfully established that Alexander Davidson Bell had paid Wenham's claim out of his own monies, and obtained a subrogation of his rights and privileges? This deed is as follows: "On the 19th October, 1847, &c., personally came and appeared Joseph Wenham, of the one part, and the Honorable Matthew Bell, of the other part, between whom it was declared as follows, that is to say: He the said Wenham did acknowledge to have received from the said Matthew Bell, at or before the execution of these presents, the sum of £750, due by virtue of the deed of sale (*above mentioned*) of the 4th March, 1833, and duly assigned over to the said Wenham,

“ by deed of transfer, dated 13th March, 1844 ; and of and from
 “ the said capital sum of £750, and interest, the said Wenham
 “ did, and by these presents doth acquit, exonerate and
 “ discharge the said Matthew Bell, his heirs, &c. from
 “ henceforth for ever. And it is hereby declared, in presence
 “ of the notaries, by the said Matthew Bell, that the said
 “ capital sum of £750, and interest, paid as aforesaid by the
 “ said Matthew Bell to the said Jos. Wenham, was borrowed
 “ by the said Matthew Bell, from Alexander Davidson Bell
 “ (*the Respondent*) ; the present declaration being thus made
 “ by the said Matthew Bell, to the end that the said A. D.
 “ Bell, be placed, substituted and subrogated in the stead
 “ of him the said Wenham, and in all his rights, privileges
 “ and hypothecs, *droits, noms, raisons*, against him the said
 “ Matthew Bell, and all others whom it doth or may
 “ concern ; which said substitution and subrogation is accord-
 “ ingly made and given by the said Joseph Wenham, in
 “ favor of the said Alexander Davidson Bell, without any
 “ warranty whatever on the part of the said Wenham.”
 And *lastly*, the Respondent rested his claim on a deed,
 dated 17th November, 1847, by which he, the said Alexander
 Davidson Bell, the Respondent, accepted the assignment
 made to him in the last mentioned deed.

The opposition of the Respondent, after setting forth the
 three deeds first mentioned, contained the following allega-
 tions :—

“ And the said Opposant saith, that afterwards, to wit, on
 “ the 19th October, 1847, the said Honorable Matthew Bell,
 “ having been called upon for the payment of the said sum
 “ of £750, by the said Joseph Wenham, and being unable,
 “ of his own money, to meet the payment of the same, ap-
 “ plied to the said Opposant, for the loan of the said sum of
 “ £750, to meet the payment thereof, which sum the said
 “ Opposant agreed to lend to the said Matthew Bell, upon

“ the condition that it should be applied to the payment of
 “ the said debt, then due and owing to the said Wenham, and
 “ upon condition that he should be subrogated to the said
 “ Wenham, in all his rights and privileges respecting the
 “ same.”

This averment of the opposition of the Respondent alleges a verbal agreement of the condition of the loan, and makes no mention of an authentic document to establish the same. It will appear hereafter, that the judgment of the Court of Appeals, denying the subrogation to the Respondent, is founded principally upon the insufficiency of this allegation, and the absence of legal proof of it, by means of an authentic deed, executed before or at the time of the payment to Wenham.

In the Superior Court, the prothonotary having filed a report of distribution, in which the Respondent's claim was omitted, and the Plaintiffs, ordinary hypothecary creditors, were collocated to his prejudice, a contestation of this report was filed by the Respondent, upon which the Superior Court rendered a judgment in his favor, as follows :

“ The Court.....(*after stating the deed of sale and transfer,*) seeing that the said A. D. Bell lent to the said M. Bell, the sum of money wherewith the said debt of the said J. Wenham was paid on the 19th October, 1847, on condition that the money so lent should be applied to the payment of that debt, and also upon condition that the said A. D. Bell should be subrogated to the said Wenham in all his rights ; seeing that, by the said opposition of the said A. D. Bell, it is further alleged that by notarial deed, dated 19th October, 1847, it is expressly declared, that the said sum so paid to Wenham, had been borrowed by the said M. Bell from A. D. Bell, upon condition that the said A. D. Bell should be subrogated to the said Wenham, and that the said decla-

"ration was so made to the end that the said Alex. D. Bell
 "should be subrogated to the said J. Wenham, in all his
 "rights and privileges ; considering that the said opposition
 "not having been contested, **THE ALLEGATIONS CONTAINED**
 "**THEREIN, ACCORDING TO THE COURSE AND PRACTICE OF THIS**
 "**COURT, ARE TO BE CONSIDERED AS ADMITTED BY ALL THE**
 "**PARTIES TO BE TRUE ;** and the Court, 'further considering that
 "by means of the premises, the said sum of £750 is now legal-
 "ly due to the said A. D. Bell, and that the said A. D. Bell
 "hath been legally subrogated in the rights of Wenham by
 "that description of subrogation, known as a subrogation by
 "agreement with the debtor, *subrogation par convention avec*
 "*le débiteur*, **ORDERS** the report to be amended, and the said
 "A. D. Bell to be collocated by *privilege de bailleur de*
 "*fonds.*"

The Opposant, Bell, had already filed a former opposition,
 claiming the same sum of £750, but which made no allusion
 to the last mentioned deed, dated 7th November, 1847, and
 did not contain the allegations above cited of a verbal agree-
 ment : the Respondent had not been collocated upon this
 former opposition ; he had contested the report of distribu-
 tion, and his contestation had been dismissed, on the ground
 that it was not established by the notarial instrument, styled a
quittance générale, dated 19th October, 1847, or in any other
 manner, that the said sum of £750 had been advanced by the
 Opposant, to pay Wenham, and on condition that the said
 Opposant should be subrogated, &c. ; and that the said
quittance had not, in law, the effect of subrogating the
 Opposant to Wenham. To this former opposition, the Res-
 pondent obtained leave to substitute the one now submitted
 to the Court of Appeals, containing the additional allegations
 above mentioned.

The Appellants claimed the reversal of the judgment of
 the Court below, upon several grounds ; 1o. the irregularities

of the proceedings, 2o. the plea of *res judicata*, and 3o. upon the ground, adopted by the Court of Appeals, that the said Respondent could not, by law, claim to be subrogated in the rights of the said Wenham, without an authentic instrument, to which he was a party, executed before or at the time of the payment to Wenham, and that the deed of the 17th November, 1847, could confer no right which had not been previously acquired by the said A. D. Bell; the privilege of the said Wenham having been extinguished to the benefit of the Appellants. The Court of Appeals did not adjudicate upon the two first grounds above stated.

ROLLAND, Justice: The Court has already made mention of the irregularities and deficiencies in the transmitted record; they may be mere omissions in the transcript. The parties did not choose to take notice of them, the Court must judge the case in the state it appears to have been submitted to the Court below.

On the 28th October a contestation of a report of distribution, by the Respondent, his claim being founded on the debt and privilege now in question, was dismissed. This would have been conclusive but for an application made on the 11th November, by the same party, to file an opposition which is for the same debt claimed by the former one; upon the introduction into the record of this second opposition a second report is drawn up, and the Opposant Bell, not being collocated, contests this report upon the ground that his claim is preferable to that of the Plaintiffs, the present Appellants;—He alleges that one Wenham was creditor, as *bailleur de fonds*, of the proprietor, *se soisi*, Mr. Matthew Bell; That on the 19th of October, 1847, the debtor paid the debt, stating, that he did so with monies borrowed from him, the present Respondent, that the debt was transferred to him by the act of *quittance* given by the said Joseph Wenham, whereby he became subrogated and

placed in the rights and privileges, &c. of the said Wenham ;—But as the Opposant was not a party to this deed, evidently it could not be considered in the light of a *cession*, the effects of which are well known. This was the statement in the first opposition, which was dismissed, and this judgment must be and is (I believe) admitted on all hands to be correct. Yet, at the hearing, the Respondent did not give up the idea of a *cession* or *transport*, because he contended that there had been, at a later day, an acceptance of the subrogation granted, it was said, by Wenham to the Respondent, who was represented in the first deed by the debtor, Mr. Bell. The Opposant must feel that this acceptation adds nothing to his case, inasmuch as Mr. Matthew Bell, being the debtor and acting for himself, paying his debt, and taking a *quittance*, could not act for or represent the person who lent him the money, for the purpose of securing to him the subrogation of a debt which he then and there extinguished by payment: the law has foreseen the possibility of fraud in such transactions, inasmuch as it exacts an actual loan, on the condition of a subrogation, to authorize or give effect to such subrogation, when stipulated by the debtor at the time he pays the money.

With this statement in the contestation of the report above alluded to, the Respondent could hardly expect to succeed. But there is another averment by which he considers he can take advantage of an allegation of the essential fact of a loan with *stipulation of a subrogation*, for although in his contestation, he states no such thing, yet we find in that document this statement “ as the whole is more fully set forth in “ the opposition of the said A. D. Bell, filed in this cause, to “ which reference is hereby made.” One would have expected that a full statement of the claim, and of the grounds of the privilege claimed, would be found in the contestation itself, but there is evidently a defect in the averment on that head,

and the party contesting manifestly intended that the Court should refer to the opposition itself.

I will now proceed to examine the averment in the opposition upon which the claim of the privilege of *Baillieur de fonds* is founded, it is as follows : " That on the 19th of October, 1847, the said M. Bell, having been called upon for the payment of the said sum of £750 by the said Jos. Wenham, and being then unable, of his own money, to meet the payment of the same, applied to the said Opposant for the loan of the said sum of £750 to meet the payment thereof, which sum the said Opposant agreed to lend to the said Matthew Bell, upon condition that it should be applied to the payment of the said debt, then due and owing to the said Jos. Wenham, and upon condition that he should be subrogated to the said Jos. Wenham, in all his rights and privileges respecting the same." Then follows a statement, that on the same day a deed was passed in which Wenham acknowledged to have received from Mr. Matthew Bell the sum in question, he, Matthew Bell, declaring that the money, so paid, was borrowed from the Respondent, this declaration being made to the end that the Respondent might be subrogated in the rights and privileges of Wenham. I take it for granted that that is the averment to which the Respondent, in his contestation, intended to call the attention of the Court; and, to give him the whole benefit of his arguments, we will consider the averment in question as being part of the *moyens de contestation*. It assumes that the fact of the loan by the Respondent to M. Bell, under condition of a subrogation, is proved, " seeing, that the said opposition not having been contested, the allegations therein contained are to be considered as admitted, by all the parties, to be true." It is evident that this is not an adjudication on the law. The fact is, there was no law issue. It is a judgment on evidence; facts admitted are evidence, and the consequences to the

Appellant are the more fatal, as they result in a final judgment. This Court might at once pronounce, *en droit*, on the sufficiency of the allegation of the Respondent to justify his conclusions, and, if not found sufficient, they might dismiss the opposition, by a reversal of the judgment; but the principle invoked by the Court below, must be first got rid of. For, if the recital of facts, however untechnical, and insufficient as a plea, are really taken to be true, as if the Appellant had signed an admission to that effect, I do not know how we can say that they are utterly insufficient, at least it would require a great effort in favor of regularity of pleadings before a Court, to look to an admitted opposition as being defective in the wording of it. Therefore, it is necessary here, to discuss the merits of this assumption of a principle by the Superior Court. I cannot understand, how the default of pleading to a demand, or to conclusions taken by an adverse party, which demand has never been as much as served or otherwise notified, for the purpose of issue being joined thereon, and on which a party is called to *plaider en droit* from one day to the other, can be considered as an admission of all facts and assertions, perhaps the most untrue, and in fact a confession of judgment. If such be the case, I must say, that individuals are very much exposed to lose their rights. It would require express law, or, at least, express rules of practice, to justify such a proposition.

And, I would ask, when was it, that these Appellants were to contest or to raise issue on the Respondent's opposition? Not surely before he, the Respondent, put in his contestation. I see that on the first opposition, the Respondent filed his contestation of the report of distribution, on the 10th of September, and on the same day inscribed the cause for hearing *en droit*! This must have been done by consent. The same proceeding has been had in the present instance, and the knowledge of the existence of a contestation dates only from the service of the notice for hearing *en droit*.

I believe I may say, that in every other tribunal, the contestation is served, and the adverse party, if he does not answer, is foreclosed from so doing, and then the contesting party, as in an *ex parte* case, is entitled to proceed. He establishes his right by evidence or express admissions, and the cause proceeds as in a contested cause. No one ever heard that the allegations were admitted because no plea was filed.

I have read attentively the rules of practice published in December, 1850. Proceedings are prescribed for the homologation of reports of distribution which, in practice, have been found beneficial, to prevent the expense of evidence to establish claims of opposants : so many days after the filing of oppositions *afin de conserver*, the Prothonotary draws out a report of distribution ; it is published by an *affiche*, and thus notified to the parties. If no contestation is put in, a motion for homologation is made, *affichée* and notified in the same way : if no one opposes, every party is supposed to acquiesce, not that all the debts are established and the facts alleged taken to be true, but the parties are supposed to admit each other's collocations—

Unfortunately for the present Appellants, this supposed admission has been extended to an Opposant who was not collocated, because his claim was by the Prothonotary considered unfounded and against a creditor who is collocated, and so far has an acquired right which the other must defeat. And here the Appellants have lost their rights, because they are presumed to have admitted the adverse pretention and their own irregular collocation. They have acquiesced, or are presumed to have done so, not having answered or denied these adverse pretentions. And yet, when had they an opportunity to do so ? It may be said that on receiving the notice of inscription, and being informed of a contestation having been filed, the Appellants might have moved to discharge this inscription, and apply for a

delay to put in a plea. But why should they be obliged to apply for leave to defend their rights? The Opposant here is the actor, he must signify his claim to his adverse party, who is the Defendant; and where is it to be found, that this demand, these conclusions are not to be served like all other demands and conclusions, particularly the demand and the conclusions of one who has not been collocated? I would say there must be nothing short of a written rule to dispense with such a formality and create a tacit acquiescence of the character of that in question, and which is the basis of the judgment of the Court below. Again, the legal course (there being no written Rule against it) would be to join issue on the contestation of a report of distribution, or that the party be called to answer; if he neglects to do so, let him be foreclosed, and the contesting party proceed *ex parte*. We must recollect that he is not like the collocated creditors whose claims are taken to be well founded, because the others (being called on to do so) have refused to contest—neglect amounting to a refusal. If an answer is put in, and there is a law issue raised by either party on the pleadings, then it may be that allegations, that is facts, are admitted by the answer. Then there is no difficulty, hearing takes place on the merits. If the facts alleged are not admitted, the party whose allegations are denied may either inscribe for hearing *en droit*, to save the expense of an *enquête*, in case the Court should be against him, or he may at once inscribe for an *enquête*.

Having, as I conceive, disposed of this assumption of acquiescence, I must proceed further, and take the case as heard on the principle of such acquiescence, however objectionable I may find it, and consider whether the Respondent, Bell, has a right to his conclusions. I conceive he has not and I consider the judgment erroneous; for I find that he has not stated enough to show that he has acquired

subrogation to a privilege ; his statement does not carry with it an assertion that he holds that title to a subrogation, under the circumstances, which alone the law recognizes in a person lending his money to discharge a debt, under special stipulation of such subrogation, and that he has observed the formalities indicated by a jurisprudence so well established ; I am of opinion that we need not have recourse to an *arrêt* reported in the *Journal des Audiences* of 1690, and often alluded to in the books. It is merely confirmatory of the prevailing jurisprudence. The preamble establishes this, and surely this *arrêt*, although called an *arrêt de règlement*, did not require *enregistrement au Conseil Supérieur* to be cited as authority. It is not law, but certainly good authority in Canada. The object of this enunciation of principles was to guide the *Cour du Parlement* in future, but was not in respect of the necessity of a notarial act to render authentic the proof of the loan of money with the stipulation of subrogation, but for one object only, and that was with respect to the “*nécessité du consentement à la subrogation de l'ancien créancier,*” and also in regard to sureties. The necessity of notarial acts is stated as an existing jurisprudence, so I read it. A notarial deed, or an authentic *acte*, is required to give the contract a date to prevent frauds and collusions, and such deed cannot be dispensed with by Courts of Justice. This was the jurisprudence. Here, the Respondent has not alleged the existence of such a contract. He has alleged a kind of verbal understanding between Mr. Matthew Bell and himself. If the Respondent had not filed one of the documents alluded to in his opposition, would the Prothonotary be wrong in excluding him from the collocation ? Assuredly not. Then, out of four deeds or notarial acts, he has filed only three, and he has omitted to file the most essential one. The Prothonotary was therefore right, and his Report must be confirmed. Yet the same report is ordered to be reformed. I can see no ground for this. Either the Opposant has the deed

and will not produce it, by which he prevents his adverse party from using the usual mode of defence to a demand founded on a notarial act, such as *Inscription en faux*; or there is no such deed in existence, and his claim is unfounded.

One of the advantages of an issue raised on a contestation to a report of distribution is, that a *défense en droit* can be put in, and the whole case be determined on a law argument; that admissions of facts may be made to prevent an *enquête*; that if, by a slip of the pen, an essential fact, for the support of the contestation, has been omitted, and this is pointed out by the demurrer, the party will not necessarily lose his debt; he may move to amend, on payment of the costs of the demurrer. Then, all parties will have had occasion to admit or deny the right of collocation, and no one will be taken by surprise. Whereas, in the mode adopted in this case, a judgment is entered on a hearing *en droit*, whereby one of the parties is ousted without a remedy, particularly in consequence of the supposed tacit admission of facts, when none, in my mind, could be intended nor should have been assumed, for there is neither Law nor Rule of practice to justify this.

This cause furnishes an example of a case of a hurried argument without proper consideration. Parties will be astonished to hear that the allegations of the Respondent are so loose, that there is not even an allegation of a loan—no allegation that he lent the money, but merely that he agreed to lend, and then the allegation that Mr. Bell actually paid his debt with money so lent; the allegation being that in a notarial deed, between Wenham and Mr. Bell, it is asserted that he, the Opposant, did make such loan. The party here is Alexander Davidson Bell; he must allege the two essential facts—the lending and the actual employment of the money. Under the allegations, such as they are, this Opposant might swear that no such fact existed, and yet he would not be in

contradiction with the assertions in his opposition. All these could be corrected on application to amend, if an opportunity were given. But now, as the Respondent insists on the regularity of his inscription and the propriety of the judgment on such hearing, these insufficiencies of allegation come strongly against him, and he must abide by the consequences on a hearing *en droit*. The Court are unanimous that he must be dismissed, and the judgment reversed.

I acquiesce in the judgment to be given, but I must say I would have preferred ordering an issue to be joined on the contestation of the Respondent, and a regular proceeding as in other cases of litigation. There is nothing in the Rules to prevent it. It is the practice in the District of Montreal. I am of opinion that it is the better practice, and the only one that can give security to suitors. By the judgment of the Court below, the Appellants lost their case; by the one drafted by me, which does not declare the inscription irregular, the Respondent loses his debt, and it may be a question who *au fonds* is the one who ought to succeed, although probably the latter judgment may be viewed by us as the best.

The draft of my judgment is as follows :—

“ Considering that there appears on record no order or
 “ permission granted to the Respondent (Opposant in the
 “ Court below) for the filing of his opposition, as asked by
 “ him on the 11th day of November 1850, by rule *nisi causâ*
 “ on the 18th, which rule was heard but no order made
 “ thereon, and that consequently the contestation by him of
 “ the report of distribution (made also without any order
 “ or authority from the Court appearing on record) should
 “ not have been received, nor the inscription made on the 5th
 “ of December, for hearing on the 6th such contestation;
 “ considering also that no opportunity was given to the present
 “ Appellants for answering either the opposition of the said

" A. D. Bell or the contestation, and that no issue was joined
 " thereon, or any steps taken by the Opposant to foreclose parties
 " from answering thereto ; considering that there was error
 " in the judgment of the Court below in assuming that, as
 " the opposition of the said A. D. Bell had not been contested,
 " the allegations, therein contained, were to be considered as
 " admitted by all the parties, as although, to a certain extent,
 " the claim of a creditor, who has been collocated may be considered
 " as admitted if not contested, that is, the judgment homologated
 " by the acquiescence of all parties, no such rule can be applicable
 " to an opposant or creditor not collocated, such non collocation being,
 " in many cases, attributable and justified by the absence of titles or
 " documents in support of his claim such as he ought to have
 " filed with his opposition ; considering also that, on an argument
 " *en droit* on the pretensions of a non collocated party, no new
 " report of distribution ought to be ordered without evidence or direct
 " admission of facts—nor ought such argument *en droit* to be
 " had without a law issue : " judgment reversed, &c.

AYLWIN, Justice : This case is a very simple one. Since Toullier and Troplong have written upon the matter of subrogation, many difficulties have been removed, but the point to be decided in this cause, may be so decided upon the opinions of our own writers. Nothing is more certain than that by the Roman, as well as by the French law, there was always required a written and an authentic proof of the loan to be made, and upon which the subrogation was to be based ; and it was necessary that such loan should be made before or at the time of the payment. The Arrêt of the Court was not introductory of a new law : it merely stated the law had always been. It is so established by an Arrêt found in the 4th Vol. of the Journal des Audiences, which decided that an authentic proof of the loan was

required in such cases. It is true, the Opposant, Bell, has alleged in his opposition a previous verbal agreement, that he should lend the money, provided he was substituted to the creditor, but he produces no authentic proof that he did so, and this fact the Court cannot consider as admitted to be true. The payment made to J. Wenham took place on the 19th October, 1847: the acceptance by A. D. Bell only took place on the 17th November, 1847, the lapse of time which occurred between the execution of these two deeds is too long. The Opposant cannot claim as the assignee of Wenham, not having been a party to any deed signed by the said Wenham. When the Opposant, Bell, made the acceptance, Wenham's debt was extinct. If a subrogation were allowed in such cases, all sorts of frauds could be practised to the prejudice of third parties; a debtor could pay his debts with his own money, and subsequently obtain a subrogation in favor of his friends and relations, and give them a preference over other creditors. The judgment of the Court below must be reversed.

PANET, Justice :—I concur in the judgment of this Court upon the ground that the Opposant ought to have had written proof of his loan; but I differ with the President of the Court, in his remarks upon the practice followed in the Court below in relation to the contestation of oppositions and reports of distribution, and I am fully of opinion that this practice is consonant with law, equity and reason: it is conformable to the practice in France as stated in Pigeau, and has, by experience, been found beneficial to the interest of snitors. In France, a Commissioner was appointed to establish the order of distribution between the creditors: it was generally made *à l'amiable*. If difficulties arose, the parties were sent before the Court. Here a rule of practice requires all Opposants to file their titles with their claims, and upon the production of these titles, the Prothonotary

draws the report according to the law and the facts of each case. In this instance, the Prothonotary excluded Bell, because he had not filed a title establishing his loan, which is required by law, as he would exclude an ordinary hypothecary creditor who would neglect to file his title ; there was no necessity to contest the opposition of Bell, as he was not collocated, but upon Bell's contestation of the report, a mere question of law could well be tried and determined as to his right of claiming a subrogation without a *titre authentique* of his loan : and that is the question we now determine, as upon a demurrer or *défense en droit*.

“ The Court of Queen's Bench considering that the second Opposition of the Respondent, dated the fifteenth of November, one thousand eight hundred and fifty, upon which the Judgment under revision was rendered, in legal substance and effect, was not different from the Opposition by him originally filed, and that the allegation—“ And the “ said Opposant further saith that, afterwards, to wit, on “ the nineteenth day of October, one thousand eight hundred and forty-seven, the said Matthew Bell, having been “ called upon for the payment of the said sum of seven “ hundred and fifty pounds, by the said Joseph Wenham, and being then unable, of his own money, to meet “ the payment of the same, applied to the said Opposant “ for the loan of the said sum of seven hundred and fifty “ pounds to meet the payment thereof ; which sum the said “ Opposant agreed to lend to the said Matthew Bell, upon “ condition that it should be applied to the payment of the “ said debt, then due and owing to the said Joseph Wenham ; “ and upon condition that he should be subrogated to the “ said Joseph Wenham, in all his rights and privileges “ respecting the same,” introduced into the said second Opposition, is an insensible allegation, inasmuch as it does not set forth any Notarial Instrument, giving a date certain to the contract for a loan supposed to have been entered into

between the Respondent and the Honorable Matthew Bell, in the said Opposition named ; and that the deed executed between the Respondent and the said Honorable Matthew Bell, before Bignell and colleague, notaries, on the seventeenth day of November, one thousand eight hundred and forty-seven, was and is wholly inoperative, and establishes no contract to the prejudice of third parties ; Considering also, that no admission of the parties, as that stated in the said judgment, under the circumstances, could confer upon the Respondent any privileged claim, on the immoveable property in question in this cause, and that the absence of a contestation or issue of fact between them, imported no such admission as has been, erroneously, assumed by the Court below, doth reverse the said judgment under revision, to wit, the judgment therein rendered on the third day of March last past ; and proceeding to render the judgment which the Court below ought to have rendered, this Court doth dismiss the contestation filed by the Respondent to the Prothonotary's Report of Distribution ; and doth maintain the collocation of the said Appellant in preference to the Respondent, in manner and form as reported by the Prothonotary, and doth condemn the said Respondent to pay to the Appellants the costs by them incurred in this behalf, as well in the Court below as in the Court here.

The judgment of the Superior Court on the first Opposition was rendered on the 28th October, 1850, by BOWEN, Chief Justice, and MEREDITH, Justice ; the judgment on the second opposition was rendered the 3d March, 1851, by BOWEN, Chief Justice, BACQUET and MEREDITH, Justices.

STUART, A. for Appellants.

HOLT and IRVINE, for Respondents.

CARON, Counsel.

No. 1051	{	LEE,.....	<i>Demandeur.</i>
		vs.	
de		LAMPSON,.....	<i>Défendeur,</i>
		et	
1851.		DIVERS,.....	<i>Opposants.</i>

Jugé, que dans la saisie-exécution de meubles, le commandement de payer n'est pas nécessaire.

Jugement rendu le 16 décembre, 1851.

Les meubles du Défendeur furent d'abord saisis par le Demandeur. Le Demandeur ayant fait défaut de procéder sur sa saisie-exécution, Renaud et *al.*, créanciers du Défendeur, qui s'étaient portés Opposants dans la cause, se firent substituer au Demandeur pour procéder à la vente des meubles saisis. En effet, ils firent émaner un Writ de Venditioni Exponas, en vertu duquel ils procédèrent à faire vendre les meubles du Défendeur, lorsque celui-ci fila une *opposition afin d'annuler*, alléguant que le jugement interlocutoire par lequel les Opposants, Renaud et *al.*, s'étaient fait substituer, ne lui avait pas été signifié, et qu'eux, les dits Opposants, ne lui avaient pas fait ou fait faire de commandement de payer.

BOWEN, Juge-en-Chef :—Les formalités voulues par l'ordonnance de 1667, sur la saisie-exécution de meubles ont été abrogées par l'Ordonnance de la 25e Geo. III, Cap. 2, qui règle les formalités que l'on doit observer sur l'exécution d'une saisie dirigée contre les meubles d'un Défendeur ;

le commandement de payer, au reste, n'est pas une des formalités voulues par l'Ordonnance de 1667, qui a établi toutes les formalités nécessaires pour cette saisie ; l'Ordonnance de 1539, exigeait *trois* jours entre le commandement et la saisie-exécution ; mais sa disposition est tombée en désuétude. (1).

La question de savoir si ce commandement était nécessaire s'est présentée à plusieurs reprises devant les cours de justice en ce pays, et il a toujours été jugé que cette formalité n'était pas nécessaire. (2)

L'Opposition est donc déboutée avec dépens. .

STUART et VANNOVUS, pour Lampson.

AHERN, pour Renaud et *al.*

(1) 1 Pigeau 607.

Avant de saisir, il est d'usage de faire un commandement au débiteur, pour qu'il paye et évite l'éclat fâcheux des contraintes.

On ne voit aucune loi qui exige cet acte ; il paraît qu'il était pratiqué avant l'ordonnance de 1539, puisque cette loi le suppose usité, et prescrit de le faire à personne ou domicile. L'ordonnance de 1667, qui a établi toutes les formalités nécessaires pour cette saisie, ne parle nullement de commandement.

L'ordonnance de 1539, exige trois jours entre le commandement et la saisie-exécution ; mais sa disposition est tombée en désuétude et avec raison : un débiteur de mauvaise volonté, ou qui serait hors d'état de payer, pourrait facilement détourner ses effets. A Paris et dans nombre d'endroits, on pense que l'on peut saisir dès le lendemain, mais non auparavant, M. Jousse, sur l'article 3 du titre 33 de l'ordonnance de 1667, estime que le commandement peut-être fait par le procès-verbal même de saisie, et qu'il n'est besoin par conséquent d'aucun intervalle.

(2) No. 5 de 1806, Volant *vs.* Drapeau :—No. 384 de 1812, Pozer *vs.* L'Espérance :—No. 604 de 1818, Robinson *vs.* Wilson :—Couturier et Lacroix en appel.

SUPERIOR COURT.—MONTREAL.

Before DAY, SMITH and MONDELET, Justices.

No. 2241 { ST. JOHN,.....*Plaintiff*.
of { vs.
1851. { DELISLE *et al.*,.....*Defendants*.

Held, 1o That a Bailiff's certificate cannot be taken as authentic to establish the signification of an assignment before notaries.

2o That a general answer to a plea is sufficient to put the Defendant to the proof of the allegations contained in such plea.

Jugé, 1o Que le certificat de l'Huissier n'est pas une preuve authentique de la signification d'un transport fait devant notaires.

2o Qu'une réponse générale à un plaidoyer est suffisante pour obliger le Défendeur à la preuve des allégués de tel plaidoyer.

Judgment the 30th day of December, 1851.

Action to recover £72 11s. 3d. balance of a Notarial obligation for £1000, consented by the Defendant Delisle, as principal, and the other Defendants as sureties, in favor of the *Montreal Provident and Savings Bank*, and by the Bank assigned to the Plaintiff by deed executed before notaries, the 15th December, 1848—

The Defendants pleaded :

1. That the pretended transfer to the Plaintiff from the Bank was only signified to the Defendant Delisle, on the 21st December, 1848, at twelve minutes before noon. That on the 20th December, W. H. Coffin, Esquire, transferred to Delisle £72 15s. 2d. part of a larger sum deposited by the *cédant* in the Savings Bank ; that this transfer was signified to the Bank at a quarter past nine o'clock A. M., on the twenty-first December, by Wm. Moore, one of the bailiffs of the Court of Queen's Bench for the District of Montreal, by delivery of a copy thereof to Charles Freeland,

actuary of the Bank, at the office of the Bank, and that thereby the debt due by Delisle to the Bank was compensated and extinguished.

2. That the Bank had no power to make the transfer to the Plaintiff, inasmuch as the Bank had neglected to fulfil the formalities required by the 4 and 5 Vic, cap. 32, providing for the establishment of Savings Banks, and had therefore no legal existence.

3. *Défense au fonds en fait.*

To the first plea, the Plaintiff, denying the allegations therein contained, answered, that the Defendant could not set up the transfer from Coffin in compensation, because the Bank had become insolvent on the 1st July, 1848, and had ever since been unable to meet its engagements, and that the transfer was concerted between the parties, to enable the *cédant*, Coffin, to avoid his liability as depositor in the Bank, and with a knowledge of the insolvency of the Bank. That the trustees of the Bank were merely *mandataires* of the depositors, and that the depositors were liable each to the other, and to the creditors of the Bank, for any loss or deficiency.

The second plea was demurred to and dismissed. Then followed a general answer to the 1st and 2d pleas, that all the allegations therein set forth were unfounded in fact and insufficient in law, and a replication to the *défense au fonds en fait*.

At the *enquête* the insolvency of the Bank was proved as alleged, but no evidence was given of concert between the *cédant* and the *cessionnaire*. The Defendants proved the signification, to Mr. Delisle, of the transfer to the Plaintiff, at the time alleged in their plea, by two witnesses who were present in Mr. Delisle's office, and noted the time of the signification and delivery of the copy by the Notary. The copy of trans-

fer, filed by the Defendants, had endorsed on it the certificate of one William Moore, as one of the bailiffs of the Court of Queen's Bench for the District of Montreal, setting forth a signification of the transfer in the manner and at the time alleged in the Defendants' plea. It appeared also, that Mr. Coffin was a depositor in the Bank, at the time of the transfer to Mr. Delisle, to the amount of £216, and that the Bank had been in the habit of granting to depositors transfers against debtors of the Bank, to the extent of ninety per cent on the amounts deposited.

DAY, Justice, The attention of the Counsel in this case was directed, by the Court, to the question as to the sufficiency of a bailiff's certificate to establish the signification of a transfer before notaries ; as also to the question as to how far the signification is to be taken as admitted by the pleadings in the cause. On the first point, the Court has seen no ground for changing the opinion expressed at the time the case was submitted to the Counsel on this point. We think the bailiff's return is not to be taken as authentic. As to the other point, the Court is not disposed, for the present, to adopt the judgment rendered by the Court of Appeals in the case of *Copps vs. Copps*, (1) although, as a general rule, I hold that this Court is bound to yield implicit obedience to judgments rendered in the Court of Appeals, yet cases may arise in which it may be our duty to pause before doing so. By the eighty-fifth clause of the Judicature Act, it is enacted, " that every allegation of fact, the truth of which the opposite party shall not expressly deny or declare to be unknown to him, shall be held to be admitted by him." It is known that the opinion of the Court on this section of the law has been expressed to the effect that when the truth of all the allegations of a pleading is denied, this is equivalent to the express denial referred to in the Act ; that by denying *all* the allegations unequivocally,

(1) *Supra* p. 105.

each allegation is denied, and that it is not necessary specially to negative each allegation (1). This opinion has been held by some of the Judges in the other districts. The case of *Copps vs. Copps* came up from the Circuit Court at Quebec before the Judges of the Superior Court, who were divided in opinion. It was then carried into appeal, three Judges being present, Justices ROLLAND, PANET and AYLWIN, and an opinion, adverse to that expressed by this Court, was rendered; Mr. Justice ROLLAND dissenting. We have thus the opinion of six Judges in the other Courts on the one side, and that of the two Judges in appeal on the other. Under these circumstances, the Court feels justified in not adopting the decision in *Copps and Copps*, as governing the case, until the full majority of the Court of Appeals shall have expressed their opinion, when I shall feel it my duty to yield. We are the more disposed to take this view, from the consideration of the effect a contrary interpretation of the clause would produce on all actions now pending, rendering repleaders necessary.

MONDELET, Justice, concurring in the judgment, expressed his opinion, that a single judgment of the Court of Appeals should not establish a rule for this Court.

G. and A. ROBERTSON, for Plaintiff.

DUMAS and CHERRIER, for Defendant.

(1) *McGregor vs. MacKensie et al.*, Nos. 1811 and 1788: judgment 16th April 1851. These were actions against the maker and endorser of two promissory notes: Plea: that the notes had been obtained fraudulently and without consideration, and had come into Plaintiff's hands through collusion with the payee: to this plea, Plaintiff filed 1: a demurrer: 2 general answer: 3 replication. The parties having been heard on the demurrer, were ordered to proceed to proof *avant faire droit*. At the *enquête*, Plaintiff established the material allegations of his declaration: The Defendants produced no evidence, but at the hearing contended that inasmuch as the Plaintiff had not expressly denied the truth of the allegations contained in their plea, those allegations must, under the 85th section of the Judicature Act, be held to be admitted. The Court (composed of Day, Vanfelson and Mondelet) rejected the Defendants' pretensions. DAY, Justice, observing:—The Court finds no difficulty in the construction of the Statute. The argument turns on the word "expressly," which the Defendants contend means "severally." We are against them on this view; "expressly" means an express denial: it has no technical meaning apart from its ordinary colloquial one. The object of the Legislature seems to have been to put an end

QUEEN'S BENCH, }
APPEAL SIDE.

DISTRICT OF QUEBEC.

Before: ROLLAND, PANET and AYLWIN, Justices.

{ JONES.....(*Plaintiff*,) *Appellant*,
and
ANDERSON,.....(*Defendant*,) *Respondent*.
and
CARR,.....(*Intervening Party*.)

The Plaintiff had brought an action against the Defendant for wharf rent, and seized, upon the said wharf, by process of *saisie-gagerie*, a certain quantity of fire bricks, and hearth stones; the Defendant, amongst other things, had pleaded payment; a third party had intervened to claim the said bricks and hearth stones as his property; the Court below had held the plea of payment to be made out, dismissed the Plaintiff's action, and maintained the intervention:—

Held, in appeal, that—1o the plea of payment was not made out; and 2o that the said fire bricks and hearth stones, deposited upon the said wharf and seized upon the Defendant for wharf rent, were legally seized, under process of *saisie-gagerie*, to secure a lawful demand for rent in arrear, for the use of said wharf; and that the said bricks and hearth stones were liable and subject by law to the privilege of landlord *super insectis et illatis*, as goods and merchandize stored, kept and placed, for deposit and sale, upon the said wharf, by the agent and factor of the owner, who, under the statute 10th and 11th Vic. cap. 10, had power to pledge the goods of his consignee: Consequently, the judgments of the Court below are reversed, the Plaintiff's action maintained, the seizure declared good and valid, and the intervention dismissed.

Le Demandeur en cette cause avait poursuivi le Défendeur pour le loyer d'un quai, et saisi-gagé, sur le dit quai, une certaine quantité de briques à feu et de foyers; le Défendeur avait, entre autres choses, plaidé paiement; un tiers était intervenu dans la cause pour réclamer les dites briques et les dits foyers comme sa propriété; la Cour Inférieure avait été d'opinion, que le paiement était prouvé, avait débouté l'action du Demandeur, et maintenu l'intervention:—

Jugé, en appel—1. Qu'il n'y avait pas preuve du paiement; 2. Que les briques et foyers, déposés sur le dit quai et saisis sur le Défendeur pour le loyer d'icelui, avaient été légalement saisis-gagés, pour garantir le paiement des loyers dus pour l'usage du dit quai; et que les briques et foyers étaient sujets par la loi au privilège du locateur, *super insectis et illatis*, comme marchandises, emmagasinées, déposées et mises en vente sur le quai, par l'agent et facteur du propriétaire, lequel en vertu du statut de la 10e et 11e Vic. chap. 10, avait le pouvoir de mettre en gage les effets de son commettant: En conséquence, les jugements rendus en cour inférieure sont infirmés, l'action du Demandeur est maintenue, la saisie-gagerie déclarée bonne et valable, et l'intervention déboutée.

Judgment rendered the 17th January, 1852.

This was an appeal instituted from a judgment, rendered in the Superior Court for Lower Canada, sitting in the

to the doubts existing as to the effect of the *aveu judiciaire*, and whether it can be divided. We are of opinion the Plaintiff has sufficiently denied the allegations of the Defendants' plea. Judgment accordingly.

GRIFFIN, for Plaintiff: McIVER, for Defendants.

District of Quebec, on the 21st July, 1851, dismissing the Appellant's action.

The action, in the Court below, was upon a lease made and executed before Hossack and another, public notaries, on the 12th of May, 1849, whereby the Appellant leased, for the space and term of one year, to commence on the first day of the same month of May, and to terminate on the like day of May in the year 1850, "*unto Patrick Anderson, Esquire, Merchant, of Quebec, and represented thereto by Thomas Anderson, his brother, thereunto present and accepting thereof for and on behalf of the said Patrick Anderson, as his attorney,*" a wharf and premises in the Lower Town, of the City of Quebec, described in the deed of lease, the whole as occupied by the lessee, in consideration of the rent or sum of £125 which the lessee, represented as afore-said, (that is by Thomas Anderson,) bound himself to pay to the lessor in and by quarterly payments of £31 5s. on the last day of each quarter during the term. The lease also provided that the premises should be furnished with effects, as customary, to guarantee the payment of this rent.

The declaration, after reciting the lease, proceeds to aver that the Defendant, at the time of the making of the same, was in possession of the demised premises, and from thence had been and still was thereof possessed, and that on the last day of the quarter, ending on the 31st of January, 1850, the sum of £68 15s. was due and payable from the Defendant to the Plaintiff, to wit, the sum of £6 5s. for the balance of the quarter's rent which accrued on the 31st of July, 1849, and the sum of £31 5s. for the quarter's rent which accrued on the 31st of October of the same year, and the further sum of £31 5s. for the quarter's rent which accrued on the 31st January, 1850.

The Plaintiff prayed for, and obtained the usual process of Saisie-Gagerie, under which the Sheriff of the District of

Quebec, seized and attached, upon the wharf in question, 28,096 fire bricks and 2 hearth stones.

Upon the return of this process there was filed a demand in intervention, in the name of "Thomas Carr, of New-castle-upon-Tyne, in England, Merchant," alleging that he was the lawful owner and proprietor of the fire bricks and hearth stones which had been so seized, and praying that the same might be restored and delivered up to him. Having established by affidavit that he had consigned them to one Thomas Anderson, the brother of Patrick Anderson, they were delivered up to him on his giving security.

Besides the general issue there was filed, on the part of the Defendant, Patrick Anderson, a plea of peremptory exception, in which, after admitting the passing of the lease upon which the action was brought, he alleges:

1. "That subsequently to the passing of the said deed of lease, to wit, in or about the month of June last, (1850) at Quebec, the said John Jones did verbally lease and demise the premises described in the said declaration unto Thomas Anderson, of the city of Quebec, Merchant, to wit, for the year ending on the first day of May, 1850, and the said Thomas Anderson did thereupon enter in and upon the said wharf and premises, and did use and enjoy the same up to the first day of May instant (1850), and the said John Jones did receive, of and from the said Thomas Anderson, the rent of the said wharf and premises for the year ending on the 1st day of May instant, and hath been wholly satisfied for the said rent by the said Thomas Anderson, to wit, by bricks delivered to the said John Jones and to his order."

2. "That the rent of the said wharf and premises, demanded in and by the Plaintiff's declaration, hath been well and truly paid and satisfied to the said John Jones."

To this plea of peremptory exception the Plaintiff filed a demurrer, upon which the parties were heard, and on the 9th of September, 1850, the Court below pronounced the following judgment:—

“ The Court having heard the parties by their counsel respectively, upon the demurrer filed by the Plaintiff to the Defendant’s perpetual exception in this cause filed, doth order, *avant faire droit*, that the parties do proceed to adduce proof of their several allegations upon the issue of fact raised upon the said pleadings, according to the course and practice of the Court.”

To this interlocutory judgment an exception was filed by the Plaintiff, and it was one of the judgments now appealed from.

Issue was then regularly joined upon the pleas to the demand in chief.

To the demand in intervention of Thomas Carr, the Plaintiff pleaded—1st. The general issue, and 2ndly—A plea of peremptory exception.

In the latter pleading, he alleged :

“ That the Defendant, Patrick Anderson, represented by Thomas Anderson, his brother and agent, had taken a lease from the Plaintiff of the said wharf and premises, for the purpose of having a place to deposit *Carr’s fire bricks*, and where he could sell and dispose of the same ; that by the said lease the said Thomas Anderson, as the agent of the said Patrick Anderson, had undertaken to have the said wharf furnished with effects to guarantee the payment of the rent ; that until the institution of the Plaintiff’s action, the said Defendant, Patrick Anderson, through the instrumentality and agency of the said Thomas Anderson, his brother, had had the enjoyment of the premises, used them for the pur-

pose above mentioned, and deposited thereon the several quantities of fire bricks seized at the instance of the said Plaintiff, by Writ of *saisie-gagerie*, to guarantee the payment of the rent claimed by him ; that consequently the fire bricks seized by the Plaintiff, and claimed by the Intervening Party, were pledged, liable and bound for the payment of the said rent ; whereupon he prayed the dismissal of the intervention, and that the *saisie-gagerie* should be declared good and valid." To this exception, the Intervening Party filed, *firstly*, a general answer, *secondly*, a special answer, in which it is alledged :

" That after the passing of the said deed of lease of the 12th day of May, 1849, at Quebec, to wit, in or about the month of June then next, the said Patrick Anderson being absent from this country, he the said John Jones did lease the said wharf and premises to one Thomas Anderson, of Quebec, merchant, and did deliver possession of the said wharf and premises to the said Thomas Anderson, and the said Patrick Anderson had not then or afterwards possession of the same : And it was agreed upon, by and between the said John Jones and the said Thomas Anderson, that the rent for the said year ending in May, 1850, amounting to the sum of £125 should be paid in bricks, and in fact the said rent was so paid by the said Thomas Anderson to the said John Jones. By means whereof no rent for the said period, or for any part thereof, was or is due by the said Patrick Anderson, and therefore the said bricks, the property of the said Thomas Carr, are not liable for the said rent or any part thereof pretended to be due to the said John Jones, and could not have been and were not pledged for the security of the same."

The issue upon the demand in intervention did not differ in any respect from that raised upon the demand in chief. The questions presented by these pleadings were :—

1.—“ Whether a lease of the wharf and premises in question, was, on the 12th of May, 1849, made by John Jones, the Plaintiff, to *Patrick Anderson*, the Defendant ? ”

2.—“ Whether this lease was ever at any time afterwards revoked, annulled or made void by the parties thereto, or otherwise ? ”

3.—“ Whether John Jones, the Plaintiff, did, at any time afterwards, verbally lease and demise the premises to *Thomas Anderson* ? ”

4.—“ Whether it was competent to the parties, interested in making it appear that the lease to *Patrick Anderson* had been revoked, and another, to *Thomas Anderson*, substituted in its place, to prove by parole evidence any facts from which such inference could be drawn ? ”

5.—“ Whether the rent of the wharf and premises, for the period specified in the declaration, had ever been paid and satisfied ? ”

6.—“ If the rent was due, then whether the bricks seized in this cause were pledged and liable for same ? ”

Before the inscription of the cause upon the Roll of *enquêtes*, an order was obtained from one of the Justices of the Court below, for the examination of James Hossack, as a witness, as well on behalf of the Defendant as of the Intervening Party. On the 30th of June, 1851, motions were made, on behalf of the Plaintiff, to have the papers, purporting to be the depositions of this witness, rejected and struck from the record, the same having been taken without authority and without notice to the Plaintiff, and being otherwise illegal and informal, as being parol testimony in a case prohibited by law ; and upon these motions the parties were regularly heard, and the questions, thereby submitted for the consideration of the Court, were taken *en*

delibéré, but never afterwards adjudicated upon. The absence of any decision on this head constituted another ground of appeal in the case. The evidence on the part of the Plaintiff was chiefly documentary. He filed: 1st.—An authentic copy of the lease, upon which the action was brought, bearing date the 12th of May, 1849. 2d.—An authentic copy of the lease, under which the premises had been held by the same party during the previous year, bearing date the 23d of May, 1848.

The evidence on the part of the Defendant and Intervening Party was chiefly parol evidence.

The Plaintiff objected to the admissibility of evidence of this nature to impugn the higher evidence contained in the deed of lease to Thomas, as the attorney of Patrick Anderson.

As to the payment pleaded by the Defendant and the Intervening Party, and the other matters of fact connected with this case, the particulars thereof will be better understood by reference to the abstract of one of the cases in appeal hereunto subjoined. (1)

(1) *Thomas Anderson*, stated in his evidence, that he had been doing business four years on his own account, and that in the fall of 1848, his brother, Mr. Patrick Anderson, left Quebec, and had not since returned to this country. That the bricks were received by him from Mr. Carr, and placed upon the wharf in question. That during the year 1848, Mr. Patrick Anderson, was the Agent of the Intervening Party, and that the wharf was used for loading and discharging ships, and also for the purpose of landing Mr. Carr's fire-bricks. The principal article purporting to belong to his brother were the fire bricks. He was named Mr. Carr's Agent, in the spring of 1849, and held a power of Attorney from Mr. Patrick Anderson, during the year 1849, and still held it, as he had never returned to this country to cancel it. He transacted no new business for his brother since May, 1849—but closed some old affairs. He landed the bricks, seized in this cause, upon the wharf in question. There was no other property put there by him which could have been seized in this cause, but there was a large quantity of bricks at that time on the wharf which had been landed by his brother. The property he spoke of were bricks, out of which he says he delivered to the Plaintiff thirty thousand, in payment of a year's rent. "During the year 1849, that is after the month of May of that year, I, in no case," he says, "made out bills of parcels of the sale of any of Carr's bricks in the name of Patrick Anderson, my brother, as seller. They were made out in my own individual name." In his brother's absence he never

Thomas Anderson was examined as a witness. With respect to his testimony, in so far as it relates to any verbal lease between him and the Appellant, the Court below was

gave any of his notes to Mr. Jones in payment of any part of the rent due him by Mr. Patrick Anderson. "In my brother's absence," he adds, "any payment made for him was made by me, invariably." Being asked; "Did you, at any time, make payment of any rent on behalf of your brother, Mr. Patrick Anderson, to Mr. Jones, the Defendant in this cause?" He answers: "I settled the rent for my brother, in 1848, with Mr. Jones, for one or more quarters." Being asked to state, what sum of money in the whole he had paid to Mr. Jones, the Plaintiff, at any time for rent due to him by Mr. Patrick Anderson, his brother, and to produce his receipts, he answers—"I cannot state, from memory, the sum or sums I have paid Mr. Jones, without producing his own account current.

Question—"Was the sum of £95, under date of the 12th of May, on the credit side of this account current, ever paid by you for your brother, or by your brother himself? *Answer*—It was never paid by me for my brother; but I cannot state whether he ever paid it or not. *Question*—Was your brother in Canada on the 12th of May, 1849—and did he return to it since? *Answer*—He was not, nor has he returned since. *Question*—Is it not true that this sum of £95 was never paid? *Answer*—That I cannot state, but I suppose it was paid by Noad. *Question*—Whose note was the note given on the 12th of May, 1849, mentioned on the credit side of the account, and in favor of whom? *Answer*—It was Mr. Noad's note, as mentioned in the said account, in favor of Mr. Jones, I think. *Question*—Is it not true that Mr. Noad so granted his note, in favor of Mr. Jones, upon an undertaking on your part to pledge to him, Mr. Noad, a quantity of Carr's fire-bricks, equal to the amount or more? *Answer*—Whatever arrangement was made with Mr. Noad was made by Mr. Jones, on behalf of my brother, giving him a lien on a quantity of bricks. *Question*—Is it not true that you personally agreed, with Mr. Noad, to pledge thirty-five thousand of Carr's fire-bricks for the payment of the amount of the note he so gave Mr. Jones? *Answer*—It is not. *Question*—Had you any agreement at all with Mr. Noad in relation to the pledge in question; and, did you or did you not go to Mr. Noad's office in relation thereto? State, particularly, all that occurred between you and Mr. Noad. *Answer*—I had no agreement at all with Mr. Noad, in relation to the pledge in question, further than what Mr. Jones had made, and I do not remember even speaking to Mr. Noad in relation to the affair at that time. I went to the office of Mr. Noad, with Mr. Jones, and signed a paper on behalf of my brother, giving him a lien on a quantity of bricks."

It appears, by an account in the handwriting of this witness, and produced by Henry John Noad at the time of his examination, as well as by the deposition of that Gentleman, that acting for his brother, Patrick Anderson, he induced Mr. Noad to grant his note to Mr. Jones upon the security of 25,000 of Carr's fire-bricks, which he afterwards refused to deliver. In consequence of which refusal Mr. Jones himself was obliged to retire the note. This note, then, not having been paid, Patrick Anderson was not entitled to the credit given to him for £93 1s. 1d., under date of 12th of May, 1849, in the account produced by Thomas Anderson, on his examination.

Failing to establish, by other evidence, the alleged revocation of the lease to Patrick Anderson, and the alleged payment of the rent, the Defendant and the Intervening Party examined the Plaintiff on interrogatories, upon *faits et articles*.

Interrogatories upon *faits et articles* submitted to John Jones, the Defendant in intervention.

moved, on the 12th day of December, 1850, to reject the same, on the ground that parol testimony could not legally be adduced of such a lease ; and to set aside the ruling of

First interrogatory.—Is it not true that in the month of May or June, one thousand eight hundred and forty-nine, at Quebec, you were informed by Mr. Thomas Anderson, brother of the Defendant in this cause, that he the said Patrick Anderson was not coming out to this country again, or was not going to continue his business here, and that you then agreed in accepting a proposition of the said Thomas Anderson, that he (Mr. Thomas Anderson) should have your wharf upon the same terms, and that if you and he (Mr. Thomas Anderson) could agree as to the price of the bricks, you would take the rent from him in bricks ?

Second interrogatory.—Is it not true that on or about the sixth day of September, 1849, at Quebec, you received from Mr. Thomas Anderson, or from his clerk, the original of the paper-writing hereunto annexed, or a copy of the same, or a paper in substance the same ? And you are required to produce and file such paper with your answers to these interrogatories.

Third interrogatory.—Is it not true that on or about the sixth day of September, eighteen hundred and forty-nine, at Quebec, you received from the said Thomas Anderson, or his clerk, a statement or account respecting the quantity of thirty thousand fire-bricks, or thereabouts ? And you are required to file with your answers such statement or account.

Fourth interrogatory.—Is it not true that after the said sixth day of September, or about that time, you disposed of the said quantity of thirty thousand fire-bricks, or thereabouts ?

Fifth interrogatory.—Is it not true that on or about the sixth day of September, you sold and disposed of the said bricks, or a portion of them, (and state what portion,) to Mr. Donald Fraser, of Quebec, merchant ?

Sixth interrogatory.—Is it not true that on or about the seventh day of September, in the year aforesaid, you were present at the delivery of the said bricks upon the said wharf, to a servant or agent of Mr. Donald Fraser, and when the said thirty thousand fire-bricks were counted off and marked in Mr. Fraser's name ?

Seventh interrogatory.—Is it not true, that afterwards, on the same day, in your presence, Mr. Thomas Anderson accepted your order for the said thirty thousand fire-bricks, in favor of the said Donald Fraser ?

Answers to the foregoing interrogatories.

To the first interrogatory.—No ; I never had a proposition made to me for changing the lease.

2nd.—Yes ; I now produce the paper-writing.

It runs as follows : " To Thomas Anderson, Dr.

To 30,000 of Carr's fire bricks, at £5 £150 0 0

The above sale is for wharfage ; on the amt. due I allow him the com. 5 per cent. and on $\frac{1}{2}$ not due, no commission.

Quebec, 6th September. Signed, THOMAS ANDERSON,

3rd.—No.

4th.—Yes.

5th.—Yes ; the whole quantity was put into the hands of Donald Fraser, for sale on commission at five per cent.

6th.—Yes ; I was present when a pile of the bricks was marked off by Mr. Fraser's cooper, which was supposed to contain thirty thousand, but which however did not turn out that quantity.

7th.—Yes ; a paper written by Mr. Fraser or his clerk was signed by both Mr. Anderson and myself, purporting to guarantee the full quantity of thirty thousand bricks, free of charge, either by Mr. Anderson or me.

Mr. Justice MEREDITH admitting the said testimony. Upon this application, the parties by their counsel were respectively heard, and, under an order for a rehearing, again

Supplementary Interrogatories.

First Interrogatory.—Is it not true that when the paper writing or account annexed to your answers upon interrogatories in this cause filed, was written and handed to you, on or about the sixth day of September, eighteen hundred and forty-nine, you understood the word “wharfage,” therein written, to mean wharf rent for the wharf in question in this cause? If nay, state what meaning or interpretation you understood to be attached to the said word by Mr. Thomas Anderson.

Second.—Is it not true that the “ $\frac{1}{2}$ not due” in the said paper writing, had reference to the three quarters rent of the wharf in question in this cause—which commenced on the first day of August then last past? And which the said Thomas Anderson had agreed to pay you? If nay, state what you considered to be the meaning of the said words “ $\frac{1}{2}$ not due”?

Answers to Supplementary Interrogatories.

To the first interrogatory.—I did not notice, at the time I received the paper writing referred to, the word “wharfage,” nor indeed the contents of the memorandum in question generally. Nor indeed did I ever observe that the bill of sale was in the name of Mr. Thomas Anderson; I cannot say what Mr. Thomas Anderson meant by the word “wharfage”. Mr. Thomas Anderson individually neither owed me wharfage nor wharf rent.

Second.—As I have already said, in my answer to the previous interrogatory, I had not noticed the wording of the memorandum written on the account referred to; the said memorandum so written by Mr. Thomas Anderson, if it meant to infer that $\frac{1}{2}$ of the rent was not due, is erroneous. In point of fact there was due to me (at the time the lot of bricks was so given over to me) by Mr. Patrick Anderson, the full amount of the sum mentioned in the bill of sale.

Defendant to the Plaintiff.

First interrogatory.—Is it not true that, on or about the sixth day of September, eighteen hundred and forty-nine, at Quebec, you received from the Defendant, or his agent, Mr. Thomas Anderson, about thirty thousand fire-bricks, of the value of about one hundred and fifty pounds?

Second.—Is it not true that on or about the said day, you received from the Defendant, or his agent, for rent of the wharf and premises mentioned in your declaration in this cause filed, about thirty thousand fire bricks, of the value above mentioned?

Third.—Is it not true that the same day or previously to your receiving the said bricks, and in connection therewith, you had received from the Defendant or his agent, the paper-writing annexed to your answers to the interrogatories upon *faits et articles* submitted to you by the intervening party in this cause?

Fourth.—Is it not true that at the said time there was no wharfage due to you by the said Defendant or by the said Thomas Anderson? If you say that there was wharfage due, say in what manner and under what circumstances the same became due, and to what amount?

Fifth.—Look at the exhibits numbers 1, 2, 3, 4, 5, 6 and 7 filed by the Defendant in this cause upon the examination of James A. Hossack, a witness, and state, if it is not true, that the said orders and papers have reference to the bricks specified in the above mentioned paper-writing.

Sixth.—Is it not true that, on or about the thirteenth day of June, one thousand eight hundred and forty-nine, you handed to the said Thomas Anderson,

heard, before a full Bench, the 24th of March, 1851, when the case was again taken *en délibéré*. On the 12th of April following, the Court, composed of Mr. Chief Justice BOWEN,

the account marked R, filed in this cause on the thirtieth day of April last, and is not the said account in your hand writing ?

Seventh.—Is it not true that the wharf mentioned in the said account marked R., is the same wharf mentioned in your declaration in this cause filed ?

Eighth.—Is it not true that, before the maturity of the promissory note mentioned on the credit side of the said account as "Noad's note," you received from the Defendant or his Agent, the thirty thousand fire bricks or thereabouts mentioned in the second of these interrogatories ?

Ninth.—Is it not true that the said promissory note fell due some time after the said sixth day of September, eighteen hundred and forty-nine, and that it was taken up by the said Noad ?

Tenth.—Is it not true that by "pro Noad's note" on the credit side of the said account marked R., you meant "proceeds of Noad's note," which you had caused to be discounted ?

Plaintiff's answers to Interrogatories submitted by Defendant.

To the 1st interrogatory—Answer, yes.

2nd.—Yes.

3rd.—Yes.

4th.—It is not true that there was wharf rent due at the time, for which Mr. Thomas Anderson, as agent for his brother, the Defendant in this case, had agreed to give Noad & Company, twenty-five thousand fire bricks, to be sold by them, and the proceeds applied to the payment of a hundred and fifty pounds due to me ; Messrs. Noad & Company, in anticipation, gave me their note of hand for ninety-five pounds, payable to my order, which was discounted by me ; Mr. Thomas Anderson, afterwards, refused to deliver the bricks ; they, of course, required me to pay back the money I had received for their note ; I did so, and debited the Defendant with the amount, having previously given him credit in my books for the same, on the faith of the delivery of the bricks.

5th.—Yes.

6th.—Yes.

7th.—Yes.

8th.—I am not quite sure, Noad's note matured about the twelfth or fifteenth of September ; whether the bricks had been delivered to Mr. Fraser before then, I cannot say ; the memorandum, which establishes the delivery, and which I now produce, appears not to have been dated ; the proceeds of Noad's note, ninety-three pounds one shilling and one penny, being placed to the credit side of the statement, or sketch of account of the thirteenth of June, was but a memorandum, and did not constitute a payment ; it remained to be seen whether Mr. Thomas Anderson would furnish the bricks, which, at so early a period after his promise as the thirteenth of June, was not yet to be doubted ; but finding further on that the bricks were not yet furnished, and ending by a positive refusal to deliver them, the credit of the money derived from Noad's note comes to be erroneous ; Mr. Noad never gave any note to Mr. Anderson, but to me, and at the time of handing him the sketch of account mentioned in the interrogatory, relying upon Mr. Anderson fulfilling his agreement of delivering the bricks to Noad, I gave him credit, but Mr. Anderson then knew, and still knows that he is not entitled to that credit, and that Noad made no advance to him, and I intentionally withheld my receipt until Mr. Anderson had completed his agreement by the delivery of the bricks to Noad.

9th.—Yes ; the said promissory note fell due after the sixth of September, and was taken up by Noad as the promisor, but its being so taken up did not as the transaction stood, in any wise, constitute a payment from Anderson to me ; as

Mr. Justice BACQUET, and Mr. Justice MEREDITH, pronounced the following judgment :

" The Court, having heard the parties, by their counsel respectively, upon the motion of the said John Jones, of the 12th day of December last, that the testimony of Thomas Anderson be rejected for the reasons in the said motion mentioned, considering that the paper-writing, marked A, produced by the Plaintiff, at the time of his answering upon *faits et articles*, on the 16th day of October, 1850, and the answers of the Plaintiff, as well to the said interrogatories as to the supplementary interrogatories submitted to him by the Intervening Party, form no *commencement de preuve par écrit* to justify in law the adduction of said testimony now offered by the said Intervening Party, Thomas Carr, the Court doth set aside the order pronounced by the Honorable William Collis Meredith, one of the Justices of this Court, on the 12th day of December last, by which the objection made by the Plaintiff to the adduction of such parol evidence on behalf of the said Thomas Carr, Intervening Party, was overruled."

The deposition of Mr. Hossack, which, as already noticed, was objected to, went to establish that the bricks in question had been consigned by the said Thomas Carr, the Intervening Party, to Mr. Thomas Anderson, and that they had been landed and piled on the wharf rented by Thomas Anderson [as he says] from the Plaintiff, and that they had been seized by the Plaintiff upon a claim for rent. Mr. Patrick Anderson, the Defendant, had not been in this country in the year eighteen hundred and forty-nine.

I have already said in my previous answer, that I had paid back the money to Noad, Mr. Anderson refusing to deliver the bricks.

10th.—Yes ; by the " pro " was meant proceeds of Noad's note which I had discounted, and in this instance as in other instances, where the Defendant had given me notes of hand, they naturally appeared at his credit for a time, and on my having been obliged to retire them myself, the several amounts were brought to his debit.

He then attempted to prove that the wharf was leased to Mr. Thomas Anderson, his employer, and that he, Mr. Thomas Anderson, had taken possession of the wharf, and carried on his business there as a Commission Merchant.

The parties having been heard upon the merits, the Court below, composed of DUVAL and MEREDITH, Justices, (on the 28th July, 1851,) pronounced the following judgments :

1st. Upon the demand in chief.

“ The Court of our Lady the Queen now here, having seen and examined the pleadings filed, the evidence adduced, and the proceedings had and of record in this cause, and having heard the parties by their counsel respectively, upon the issues raised and perfected between the Plaintiff and Defendant in this cause ; considering that by the evidence adduced, it is established that the rent claimed by the Plaintiff, by his present action, was duly paid to him on the sixth day of September, one thousand eight hundred and forty-nine, doth dismiss the action of the said Plaintiff with costs.

2dly. Upon the demand in intervention.

“ The Court of our Lady the Queen now here, having seen and examined the pleadings filed, the evidence adduced, and the proceedings had and of record in this cause, and having heard the parties by their counsel respectively upon the merits of their contestation in this cause raised, between the said Thomas Carr, the Intervening Party, and the said John Jones, Plaintiff in chief in the said cause ; considering that, by the evidence adduced, it is established that the Intervening Party, Thomas Carr, is the true and lawful owner of the twenty-eight thousand and ninety-six fire bricks and two hearth stones in this cause seized at the instance of the said Plaintiff ; and considering further, that at the time of the

said seizure, the rent, for securing the payment of which the said fire bricks were seized, had been paid, to the said Plaintiff, doth order and adjudge that the said fire bricks and hearth stones be forthwith restored and delivered up to the said Thomas Carr, and the Court doth condemn the Plaintiff to pay the costs of the said intervention.

From these Judgments, the Appellant, Jones, had instituted these appeals. The Appellant submitted the following points :

1. " That the rent, for the payment of which the bricks in controversy had been seized, was in arrear and unpaid at the time of the seizure."

2. " That the privilege granted by the Custom of Paris to proprietors of houses upon the furniture in them, for the rent, and the incidents thereto, extended to goods and effects in stores and upon wharves, for the purpose of trade and merchandizing. (161 Article of Custom of Paris, and Prov. Ord. 2 Vic. cap. 47, sec. 2.)"

The Respondent argued, that if the rent, as demanded by him, the Appellant, was really due, he ought nevertheless to have established :

" That Thomas Anderson had power to pledge Carr's property ; that in point of fact he had done so, and that he had deposited the bricks seized, as security for the rent ; or, that the merchandize belonging to a third party, by being placed upon a wharf, thereby becomes liable for such rent as the lessee of a wharf may owe to the lessor."

The Respondent also argued, that the Appellant had not placed his claim upon the footing of a landlord's right against the moveables of a sub-tenant, to the extent of the latter's liability to his lessor.

ROLLAND, Juge : " Je suis porté à croire que la défense du Défendeur est mauvaise. La première défense, savoir, qu'un bail a été fait à un tiers, ne semble pas une défense à l'action, à moins que l'allégué, que ce second locataire a pris possession, ne soit considéré comme l'allégué d'un défaut d'accomplissement par le bailleur de ses obligations ; mais je ne le crois pas. Quant à la seconde défense, " que la rente ou loyer a été payé, " sans dire par qui, quand, ni comment, elle est également mauvaise, à moins qu'il n'y eût preuve de paiement en deniers par le Défendeur. Mais la preuve offerte est de transactions avec un tiers, par lesquelles l'on prétendrait que ce tiers, quoiqu'agissant pour lui-même, se disant le locataire, au lieu du Défendeur, aurait donné des effets en paiement des loyers dus par le Défendeur ; je demande, comment faire application de cette preuve à la défense telle que plaidée ?

Le statut de la 12 Vic. veut que la défense contienne, comme la demande, une articulation de faits ; et cela est raisonnable, pour éviter qu'il soit permis à un Défendeur, comme autrefois, sur une dénégation générale ou une défense générale de paiement, de prouver tout ce qui lui plaira, sans que le Demandeur ait pu prévoir quelle serait la preuve offerte, ce qui le prive d'exceptions et d'objections, et de faire preuve du contraire, parcequ'il ne peut être prêt à rencontrer ce qu'on lui oppose par cette preuve.

Avant d'entrer dans l'examen des preuves, il faut voir si la défense est valable.

Je ne puis voir dans cette défense à l'action, que celle faite par le nommé Thos. Anderson, frère du Défendeur, et dans la défense, comme dans la preuve, (surtout dans la déposition de ce nommé Thos. Anderson,) je n'aperçois qu'une idée, " que lui, était le locataire, et que lui, a payé de ses propres deniers." Je ne puis m'empêcher

d'observer les contradictions dans la déposition de ce témoin intéressé, où il affirme, en se contredisant, qu'il a payé pour lui-même, et un peu plus loin, qu'il a payé pour son frère, l'une des deux propositions devant nécessairement être fausse. Evidemment le Défendeur n'a pas pu donner comme instruction à son avocat, qu'il avait, lui, payé. Et pourtant, ce doit être la seule défense, et aussi la seule preuve possible, à moins qu'on ne considère la première défense comme valable ; mais son avocat, en plaidant, a déclaré ne pas insister sur cette première défense. Le fait donc de l'acquiescement de la dette paraîtrait devoir ne pas occuper les juges, et pourtant c'est la seule chose sur laquelle la Cour Inférieure a jugé, et que les parties semblent nous avoir soumise. L'on a paru prétendre que sur un plaidoyer de paiement, il suffisait de prouver que le créancier avait reçu des effets et marchandises d'une valeur égale au montant de la dette, pour pouvoir dire qu'elle est acquittée ; mais c'est une erreur, il faut de plus que le créancier ait reçu ces choses en paiement, et qu'il y ait convention à cet effet, autrement le débiteur qui a donné ces valeurs n'a que l'exception d'une dette à opposer en compensation. Je le dirais surtout sur un plaidoyer de paiement sans dire comment le paiement a été fait. Si la Cour est d'avis que le Défendeur n'a pas établi qu'il a payé la dette, de la seule manière qu'il pouvait le faire d'après sa défense, il ne reste plus que l'intervention, et la question se réduit à savoir, si les choses saisies, appartenant à un tiers, pouvaient être saisies-gagées comme des meubles meublants dans une maison, appartenant à un autre que le locataire. J'avoue que j'ai eu beaucoup de doute à ce sujet. Les quais ont un caractère tout-à-fait particulier. Le navigateur et le commerçant sont appelés à en faire usage. Ils y déposent leurs marchandises ou autres effets, tel que le grément des vaisseaux, et ils ne peuvent s'en dispenser. Sera-t-il dit qu'ils seront obligés de s'informer si le locataire du quai a payé son loyer, ou si le possesseur en est propriétaire, et faudra-t-il qu'ils s'en

éloignent pour ne pas s'exposer à voir saisir leurs propriétés ? Dans la jurisprudence l'on a tenu les effets des tiers, servant à garnir ou meubler la maison, les marchandises mêmes des tiers, dans un magasin, comme sujets au paiement du loyer. Mais, dans l'un et l'autre cas, le dépôt est volontaire, et fondé sur la confiance que la partie a dans ces locataires, et dans leur solvabilité pour la garantir. L'on ne peut pas dire cela de celui qui aborde à un quai pour y décharger son vaisseau. Il y est invité comme à un lieu public, où il doit trouver protection, sans danger d'une saisie ou d'un procès. Mais, l'on dira qu'il peut se libérer en payant comme le sous-locataire. Je ne vois pas identité. D'ailleurs, cette question doit avoir été jugée, et en France, et ici. Elle mérite bien de l'être, de manière à fixer la jurisprudence, si elle ne l'est pas. Que le locataire ne puisse se refuser à la gagerie pour les loyers qu'il doit, cela se conçoit, mais c'est tout autre chose quand il s'agit d'un tiers. Sur ce point, je suis disposé à adopter l'opinion de M. Troplong, Priv. et Hyp. vol. 1, no. 153. L'on a cité en cette cause le jugement rendu en appel en janvier, 1840, et qui est rapporté à la page 317, du 2 vol. de la Revue de Légis. et de Juris. du Bas-Canada, (Jones et Lemesurier.) Cette partie du sommaire de ce rapport, où il est dit : " On peut saisir pour paiement du loyer d'un quai les effets et marchandises mis sur ce quai," n'est pas exacte. Ce point n'y a pas été jugé d'une manière aussi absolue. (1) La cour à l'unanimité infirme les jugements rendus en cette cause par la Cour inférieure.

(1) In appeal, 20th January, 1840, Jones and Lemesurier, a case reported in the 2 Revue de Légis : et de Juris : p. 317.

As to the right of attaching goods upon a wharf by way of *saisie-gagerie* for wharf rent.

Quant au droit de saisir des marchandises sur un quai par voie de *saisie-gagerie* pour loyers de tel quai.

Having had communication of the notes of the Honorable Mr. Justice ROLLAND, who rendered judgment in that case, with Messrs. Pemberton, Moffatt and De-Rocheblave, we are enabled to give the following additional report in relation to

PANET, Juge : Je concours dans le jugement qui va être rendu en cette cause, mais je ne partage pas l'opinion du

the right of seizing goods upon a wharf for wharf rent. In that case, the Plaintiff had proceeded by way of *saisie-gagerie*, upon affidavit, as may be seen by the following remarks :

ROLLAND, Justice, having delivered the opinion of the Court upon a question of novation raised in the cause, added :

"But we are next to pronounce on the validity of the seizure obtained by the Appellant, and his privilege on the goods seized on the premises. This seems to be of importance in the case, and it is a question not yet settled in this country, and upon which a variety of opinions exist.

If this were the case of a lease of a wharf—an open space—an *area*, as called in the Roman law, although a *prædium urbanum*, or a *grande cour*, to use the language of some french authors, we should have considerable difficulty in saying, (as was contended) that it came within the Art. 161, of the Custom, providing a remedy for lessors of houses, *maisons*, and I must say, that I, as at present advised, would be against extending this privilege of a right to *saisie-gagerie*, against the express language of the law. For it is a principle that privileges being against the common law are not to be extended. We come next to view the case as that of a lease of a store, *magasin*. This is nearer to a lease of a house, for a store may be a house called by Brodeau *Mansio*, *Domus*. It may be the habitation of man; then there would be no doubt, as Mr. Pothier says, that the law would apply. But this store may not be a house in that sense of the word, a dwelling house. We know not whether the store in question was so or not.

As the landlord's privilege on the goods exists, in our opinion, (under the 171st Article of the Custom, and in this we have no doubt to pronounce against the pretensions of the Respondents in their plea,) we are led to consider whether this *saisie-gagerie* was or not legally issued in the present case, under the provisions of that 171st Article of the Custom, to secure the rights of the landlord. This 171st Article gives the *droit de suite* in certain cases, namely, of the goods seized by other creditors, or of such as were removed, and, I would say, about to be removed. Now, every remedial law must be interpreted so as to carry into effect the views of the legislator. What would be the Writ to be issued to exercise this *droit de suite*? Would it be any thing else than a Writ of *saisie-gagerie*—which means, as translated by Brodeau, *captio pignoris*, and although, in most cases, this was done after a seizure by creditors, or removal from the premises, surely if there is evidence, and (we have the admissions of the Respondents to that effect) that the goods were to be sold, and therefore removed—there can be no objection that the landlord should prevent this injury to his rights, which injury was contemplated. The Defendants cannot complain.

Whatever might have been the difficulty in maintaining a *saisie-gagerie* under the 161st Article, where no removal of goods is taking place, if we can view this *saisie* as having taken place under the 171st Article, we should maintain it. For it is evidently for the purpose of justice, that we should secure a privilege to the landlord on goods which are his pledge, whether they be in a house, a store, a wharf or a farm. The Article 171 is by all authors declared to grant the privilege to landlords whether of a *prædium urbanum* or a *prædium rusticum*. It includes all lessors of real estate.

But there is another circumstance that induces us to distinguish this case from that of a common *saisie-gagerie* taken as a matter of course : Here the writ called *saisie-gagerie*, (it might be called *saisie-arrêt*,) is issued upon an

Président de la Cour quant à la manière de plaider et de prouver le paiement. Je suis disposé à adopter, en matière de preuve, sur des affaires de commerce, les règles de la jurisprudence anglaise, comme je suis forcé de les suivre dans le mode de procédures applicables au procès par jury. Je crois que le paiement, opposé à la demande en cette cause, était suffisamment allégué, mais la preuve est insuffisante. Il est évident que le Défendeur a voulu faire un double emploi du paiement fait au moyen des briques transportées au Demandeur.

AYLWIN, Justice, concurred. (2)

The judgments in Appeal are as follows :

Judgment on principal demand.

The Court, &c. &c. :—Considering that the Appellant has established, by legal proof, that, at the time of the bringing of this action in the Court below, the sum of sixty-eight pounds, fifteen shillings, was due and payable to him by the Respondent, for arrears of rent accrued under the

affidavit shewing the necessity of a seizure to secure the rights of privilege vested in the landlord. The name is of little consequence, if the seizure to be made under it is legal.

Indeed, I would say, that *saisie-gagerie* is the correct name, it is a *saisie du gage*, *capitio pignoris* ; and who can say that the creditor having those rights to secure, which, we are of opinion did belong to him, was not entitled to attach those goods under the circumstances ? For these considerations, the Court is disposed to maintain this seizure without expressing any opinion on the legality of the *saisie-gagerie*, in the common course, for the rent of a wharf or open space, or other property that might fall within the description of the *prædium urbanum* of the Romans, to which allusion is made by Duplessis speaking on the 161st Art. of the Custom, when he says : " le mot *maison* représente ici les héritages *urbains* des Romains, &c." We have taken some trouble in expressing our opinion that improper inferences may not be drawn from the present decision.

(2) At the time of the argument of this case, an objection was raised by the Court as to the jurisdiction of the Court below and of the Court of Appeals in the matter, inasmuch as the Defendant had not been served, but an attorney had come forward and appeared for him, without service of process. The parties were requested to cite authorities to establish that this could lawfully be done. The Defendant contended that this irregularity, if it was one, had not been pleaded by the adverse party, and that it could only be taken advantage of by the Defendant himself, by means of a *désaveu*. Upon this point he cited :

1. Condensed Louisiana Reports, p. 10 :—3. Ency : de Juris : vbo. *Désaveu* :—Serpillon, 617 :—N. Dén : vbo. *Désaveu* :—1 Merlin, Q. de D. vbo. *Assignment* 609-612 :—7 Poth. P. Civ. :—Welsby, Exch : Rep. &c.—This point was afterwards overlooked, the parties having agreed to try the merits of the case.

deed of lease, of the twelfth of May, one thousand eight hundred and forty-nine, declared upon, and that the exceptions pleaded by the said Respondent, in the Court below, were irregular and insufficient in law, and, moreover, that the Respondent failed to establish the same, by legal evidence, and that, therefore, in the adjudication of the Court below, that the rent claimed by the Appellant was duly paid to him, on the sixth day of September, one thousand eight hundred and forty-nine, there is error ; the Court here, doth reverse the said judgment, to wit : the judgment rendered in the Court below, on the twenty-first day of July last past ; and, proceeding to render such judgment as the Court below ought to have rendered, doth condemn the said Respondent to pay to the Appellant the said sum of sixty-eight pounds fifteen shillings, current money of this Province, as and for such arrears of rent, with interest thereon, from the twenty-ninth day of April, one thousand eight hundred and fifty, till paid, and costs of suit, as well in this Court as in the Court below ; and further, the Court maintains the attachment of the twenty-eight thousand and ninety-six bricks and two hearth stones, effected under the process of *saisie-gagerie* in this cause issued, to serve and avail the Appellant as security for the payment of his said rent, as by law provided, &c., &c.

Judgment on the Intervention.

The Court :—Considering that the quantity of twenty-eight thousand and ninety-six bricks and two hearth stones, claimed by the Respondent in and by his demand in intervention in the Court below, were legally seized and attached under process of *saisie-gagerie* sued out, by the Appellant, to enforce and secure a lawful demand for rent in arrear due and owing to him by Patrick Anderson, the Defendant in the Court below, for the use and enjoyment of the wharf, and premises in question in this

cause : and that the said bricks and hearth stones, at the time of the seizure thereof, were liable and subject, by law, to the privilege of the landlord, *super invectis et illatis*, as goods and merchandize stored and kept and placed, for deposit and sale, upon the said wharf and premises, by the authorized agent and factor of the said Respondent, who, under the statute in this behalf, to wit : the statute of the 10th and 11th Victoria, Cap. 10, had power to pledge the said goods and merchandize of the Respondent ; and that, in the judgment of the Court below, by which it is declared and adjudged, that at the time of the said seizure, the rent, for securing the payment of which the said fire bricks and hearth stones were seized, had been paid to the Appellant, there is error, inasmuch as the Respondent hath wholly failed to establish such payment by legal proof, doth reverse the said judgment, and proceeding to render such judgment as the Court below ought to have rendered, doth dismiss the said demand in intervention, and doth condemn the Respondent to pay to the Appellant the costs by him incurred, in this behalf, as well in the Court below as in the Court here.

JONES, for Plaintiff.

ROSS, DAVID, for Defendant.

HOLT and IRVINE, for Intervening Party and Respondent.

SUPERIOR COURT.—MONTREAL.

Before DAY, SMITH and MONDELET, Justices.

No. 1705 { KEITH,.....*Plaintiff*.
 of { vs.
 1851. { BIGELOW,.....*Defendant*.

Held, that a party who contracts a second marriage, cannot dispose by marriage contract in favor of his second wife of any portion of the *conquêts* of the first community, or of a greater portion of the *acquêts* than that accruing to the child taking the smallest share.

Jugé, qu'un homme qui convole en seconde nocces, ne peut par son contrat de mariage avec sa seconde femme, disposer en sa faveur d'aucune portion des conquêts de la première communauté, ou d'une plus grande portion des acquêts que la part afférente à l'enfant le moins prenant.

Judgment the 30th day of December, 1851.

The Plaintiff, widow of John Averton, sued the Defendant, in his capacity of Tutor to the two minor children, issue of the marriage of her late husband and Elizabeth McClintock, his first wife, for the sum of £60, interest of £1000, alleged to be due under her marriage contract.

By this contract there was an exclusion of community and dower, and in consideration thereof, a settlement on the Plaintiff, of the sum of £1000 during her life, which was at her death to revert to the children of the said marriage, or in default of such issue, to the children of Averton by Elizabeth McClintock, his first wife. To secure payment of this sum, certain real estate in the St. Ann's suburb, was specially mortgaged. By another clause of the contract, Averton made a donation to the Plaintiff of all his household furniture, valued at £200.

Averton died in February 1849, leaving two children by his first marriage, to whom the Defendant was appointed Tutor. There were no children by the second marriage.

The defendant, setting forth that he had accepted the succession for the minors, *sous bénéfice d'inventaire*, pleaded that by the marriage of Averton with Elizabeth McClintock, there had been a community of goods established between them, and that at the time of the second marriage with the Plaintiff, he had no other property than that coming from his share of

the community ; and that the provisions of the marriage contract with the Plaintiff were in violation of the rights of the children by the first marriage, and of the law regulating second marriages, (*P'Edit des secondes nocés.*)

Issue being joined, the parties went to proof :

The facts in so far as they bear on the point decided, appear from the judgment, which was as follows :—“ Considering that the Defendant hath established the material allegations in the exception, by him in the said cause pleaded, contained, and that the late John Averton in the Plaintiff's declaration mentioned, who in the year 1832, contracted marriage with the late Elizabeth McClintock, with a community of property and had issue two children of his said marriage, now living, and afterwards, to wit, on the 7th September 1848, contracted a second marriage, *convola en secondes nocés*, with the Plaintiff, could not by law give to or bestow upon the Plaintiff, his second wife, any part or portion of the *conquêts* of the said community of property with the late Elizabeth McClintock : and further, considering that it appears that the said late John Averton, by his contract of marriage with the said Plaintiff, executed on the 6th September, 1848, gave to the Plaintiff, by donation therein expressed, certain articles of furniture and other moveable property of the value of £200 7s. 6d., and further, the usufruct of £1000 during his life, which said sum of £200 7s. 6d., with the sum of £60 now sought to be recovered as interest upon the said sum of £1000, alleged to be due to the Plaintiff as usufructuary, by virtue of the said donation, greatly exceed the portion of each of the children of the said late John Averton in his *acquêts*, and by reason thereof, the said donation of the usufruct of the said £1000 is contrary to law and cannot be enforced, the Court doth maintain the said exception, and dismiss the action of the Plaintiff.

A. and G. ROBERTSON, for Plaintiff.

CHERRIER and DORION, for Defendant.

COUR SUPERIEURE.—QUEBEC.

Présents : DUVAL et MEREDITH, Juges.

No. 1350 { SIROIS.....*Demandeur*,
 de { VS.
 1852. { MICHAUD.....*Défendeur*.

Jugé, qu'une donation, à titre onéreux, dont les charges égalent la valeur de l'immeuble donné, ne peut être annulée pour cause de survenance d'enfant, car dans ce cas, elle équivaut à vente.

Held, that a donation, *à titre onéreux*, containing charges equal to the value of the immoveable property thereby given, cannot be rescinded by reason of the subsequent birth of a child, such donation being in the nature of a sale.

Jugement rendu le 14 avril, 1852.

L'action demandait l'annulation d'une donation pour cause de survenance d'enfant. Cette donation avait été consentie par Paschal Coté et son épouse au Défendeur. Le Demandeur était aux droits des donateurs.

A cette action, le Défendeur plaida que les charges de cette donation, acquittées par lui, égalaient la valeur de l'immeuble donné.

La preuve ayant établi ce fait, intervint le jugement qui suit :

La Cour.....considérant que l'acte consenti par Paschal Coté et Marguerite Michaud, son épouse, au Défendeur, devant Dumais, notaire, le 30 juin, 1821, à Kakouna, intitulé, " Acte de Donation," et pour la révocation duquel la présente action est intentée, a été fait à diverses charges, etc., appréciables à prix d'argent ; considérant que la valeur des dites charges, etc. lors de la passation du dit acte, égalait la valeur de la terre y désignée, et que par conséquent le dit

acte est un contrat équipollent à vente, qui ne peut être révoqué pour cause de survenance d'enfant—déboute le Demandeur de son action avec dépens.

LELIEVRE et ANGERS, pour le Demandeur.

SOULARD, pour le Défendeur.

COUR SUPERIEURE.—QUEBEC.

Présents : DUVAL et MEREDITH, Juges.

No. 285	{	TRUELLE,.....	<i>Demandeur.</i>
de			vs.
1851.		ALLARD,.....	<i>Défendeur.</i>

<p>Jugé, qu'on ne peut mettre en question la légalité d'une exception ou d'un plaidoyer quelconque (<i>plea</i>) qu'au moyen d'un <i>demurrer</i>, (défense en droit,) contenant les moyens de droit que l'on entend faire valoir contre telle exception ou plaidoyer.</p>	<p>Held, that an objection to the legality of an exception or plea cannot be raised but by demurrer or <i>défense en droit</i>, containing the grounds to be urged against such exception or plea.</p>
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Jugement rendu le 16 mai, 1852.

A l'action du Demandeur, le Défendeur ayant plaidé par une exception perpétuelle, le premier y répliqua généralement, et inscrivit la cause sur le rôle de droit, pour plaider l'illégalité des chefs de l'exception et les faire rejeter.

Lors de l'audition en droit, le Défendeur prétendit que le Demandeur ayant répliqué généralement à son exception, avait par là accepté la contestation, et ne pouvait plus en contester la légalité, sur une simple audition en droit. Il cita une décision rendue dans la Cour Supérieure à Québec

le 20 Décembre, 1850, No. 428, Brillard vs. Kinghorn, et la 35ème règle de pratique, qui requiert que toute défense en droit devra contenir les raisons sur lesquelles elle est fondée.

Le Demandeur invoqua l'usage suivi pendant plus de trente ans dans la Cour du B. R., et cita aussi une décision de la C. S., Québec, rendue le 3 juin, 1850, No. 703, Jones vs. Anderson, par laquelle une motion, pour rejeter un *demurrer*, parcequ'il ne contenait pas l'énumération des moyens de droit, fut rejetée par MM. DUVAL et MEREDITH, Juges. Il observa que la règle de pratique ne s'applique qu'à une défense en droit, offerte comme réponse à une action et non aux répliques aux exceptions.

DUVAL, Juge :—Il est vrai que dans la ci-devant Cour du Banc du Roi, la pratique était de répliquer généralement et d'inscrire pour être entendu en droit sur la légalité des exceptions ou plaidoyers. Quand Sir JAMES STUART a été promu au Banc, il a introduit la pratique de ne mettre en question la légalité d'une défense qu'au moyen d'un *demurrer*, ou défense en droit :—Nous croyons cette pratique plus logique et plus avantageuse, et nous l'avons adoptée, et nous entendons la maintenir par la suite. Nous avons décidé, dans la cause de Brillard vs. Kinghorn, que le *demurrer* devait contenir les raisons sur lesquelles il était fondé : quant à la cause de Jones et Anderson, où l'on prétend que le contraire a été jugé, mon opinion individuelle a été guidée dans cette cause par d'autres considérations, et mon attention n'a pas été appelée en particulier sur le point dont nous nous occupons. La règle que nous établissons est conforme d'ailleurs à la règle de pratique, s. 35.

MEREDITH, Juge : Dans la cause de Jones et Anderson, accoutumé comme je l'étais à la pratique de Montréal, je n'ai pas hésité, pour ma part, à décider qu'une audition en droit pouvait avoir lieu, sans une défense en droit spéciale,

(*special demurrer.*) Mais la majorité de la Cour ayant depuis exigé une telle défense, je n'hésite pas à adopter un mode de procédure qui, s'il n'est pas dans la lettre de la règle de pratique, qui ne parle que de défense en droit, est du moins conforme à l'esprit de cette règle.

Le jugement est comme suit :

La Cour.... vu que le Demandeur a lié la contestation avec le Défendeur en filant une réponse générale à l'exception perpétuelle du Défendeur, ordonne que les parties procèdent à la preuve.....

TASCHEREAU, J. T. pour le Demandeur.

BELLEAU, pour le Défendeur.

COUR DU BANC DE LA REINE, } MONTREAL.
EN APPEL.

Présents : ROLLAND, PANET et AYLWIN, Juges.

1851. { LEPROHON..... *Appelant*,
 et
 { LE MAIRE, &C. DE MONTREAL,..... *Intimés*.

Jugé 1. Que l'erreur de droit peut donner ouverture à l'action en restitution.

2. Que dans l'espèce, un citoyen qui a volontairement payé une taxe imposée par un règlement de la corporation municipale que la Cour déclare nul, a droit au remboursement de ce qu'il a ainsi payé.

Held 1. That the *erreur de droit* may give rise to an action for the recovery back of money paid.

2. That in the case submitted, a party, who has voluntarily paid a tax imposed by a by-law of a municipal corporation, which by-law is declared by the Court to be void, has a right to recover back what he has so paid.

Jugement le 11 juillet, 1851.

Dans le mois de novembre, 1849, en la Cour du Banc de la Reine du District de Montréal, l'Appelant institua une

action *condictio indebiti* contre les Intimés, pour le recouvrement d'une somme de £65, cours actuel, qui fut rapportée le 7 janvier, 1850, en la Cour Supérieure.

La déclaration alléguait que le Demandeur, résidant dans la cité de Montréal, avait été, dans le mois d'octobre, 1842, nommé et appointé, suivant la loi à cet égard, Inspecteur de potasse et perlasse pour la dite cité de Montréal, et que depuis ce temps il avait continué de l'être et l'était encore, et avait toujours joui et jouissait encore de tous les avantages, émoluments, privilèges et exemptions attachés à sa dite charge d'Inspecteur de potasse et perlasse pour la dite cité de Montréal ; que dans le cours de l'année 1845, les cotiseurs pour la dite cité de Montréal pour la dite année, avaient, par erreur, cotisé le dit Demandeur, comme Inspecteur de potasse et perlasse pour la dite cité de Montréal, pour une somme de £30, cours actuel, laquelle somme lui, le dit Demandeur, comme Inspecteur de potasse et perlasse pour la dite cité de Montréal, avait payée entre les mains du trésorier des dits Défendeurs le 15 novembre, 1845, et ce par erreur et sans cause, et sous la fausse impression où il avait été mis par les dits Défendeurs, qu'il était tenu envers eux au paiement de cette dite somme de £30, cours actuel. Que dans le cours de l'année 1846, les cotiseurs pour la dite cité de Montréal, pour la dite année, avaient par erreur, cotisé le dit Demandeur, comme Inspecteur de potasse et perlasse pour la cité de Montréal, pour une somme de £35, cours actuel, laquelle somme le dit Demandeur avait payée entre les mains du trésorier des dits Défendeurs, le 17 décembre, 1846, et ce par erreur et sans cause, et sous la fausse impression où il avait été mis par les dits Défendeurs, qu'il était tenu envers eux au paiement de cette dite somme de £35.

Le Demandeur alléguait de plus, que depuis la dite année 1846, il avait cessé d'être cotisé comme Inspecteur de potasse

et perlasse pour la dite cité de Montréal; et que pour les raisons ci-dessus, il avait le droit de réclamer et répéter des Défendeurs le remboursement des dites deux sommes de £30 et de £35, qu'il leur avait payées par erreur et sans cause, et sur le refus de ce faire par les Défendeurs, concluait à ce que les Défendeurs fussent condamnés à lui payer la dite somme de £65, avec intérêt et dépens.

A cette action les Défendeurs plaidèrent : 1o. par exceptions péremptoires et fins de non-recevoir,—que par un règlement du maire, des échevins et des citoyens de la cité de Montréal, assemblés en conseil, le dit règlement fait et passé le 29 avril, 1845, suivant et conformément à la loi et au statut en tel cas fait et pourvu, le dit règlement publié et en existence, et dans toute sa pleine force et vertu lors et à l'époque du paiement de la somme de £30, que le Demandeur alléguait dans sa déclaration avoir fait aux dits Défendeurs en l'année 1845, et lors et à l'époque du paiement de la somme de £35, que le Demandeur alléguait avoir fait aux Défendeurs en l'année 1846, il était entre autres choses, et nommément, par la section XLIII du dit règlement, statué et ordonné, qu'un droit annuel serait et était, par le dit règlement, imposé sur toute et chaque voûte ou hangar d'inspection dans la dite cité de Montréal, et sur tout le local occupé ou employé, aux fins de leurs affaires, par les inspecteurs de potasse, perlasse, bois, bœuf, farine, lard ou d'aucune autre sorte ou description de produits ou marchandises quelconques, et tel droit serait payable, le 1er mai de chaque année, par l'occupant ou les occupants de tel local, sur le pied de £10, cours actuel, par chaque £100, du dit cours, de la valeur cotisée chaque année, sur tel local occupé ou employé pour les fins et objets ci-dessus, ou par le propriétaire ou les propriétaires de tel local, si le droit n'était pas payé par, ou ne pouvait pas être prélevé de tel occupant ou occupants, ainsi que le tout apparaissait plus amplement par le dit règlement,

dont eux, les dits Défendeurs, filaient une copie avec leurs dites exceptions péremptoires et fins de non-recevoir, et à laquelle ils référaient comme faisant partie des dites exceptions et fins de non-recevoir.

Que la somme de £30, que le Demandeur alléguait, dans sa déclaration, avoir payée aux Défendeurs en la dite année 1845, était pour le droit dû par le dit Demandeur aux dits Défendeurs, en vertu du dit règlement, pour la dite année 1845, comme occupant un local situé dans l'arrondissement de la dite cité de Montréal, et par lui occupé et employé pour ses affaires comme Inspecteur de potasse et perlasse pour la dite cité de Montréal, en la dite année 1845, lequel local, sous le nom et description de "Potash Inspection Store, College Street," avait été cotisé, taxé et imposé pour la taxe et cotisation municipale, en vertu du dit règlement, pour la dite année 1845, comme étant de la valeur annuelle de £300, cours actuel, ce qui donnait pour le dit droit pour la dite année 1845, en vertu du dit règlement, la dite somme de £30, à laquelle le dit Demandeur avait été taxé et imposé comme dit est; et que la dite somme de £35, que le Demandeur alléguait, dans sa dite déclaration, avoir payée aux dits Défendeurs, en la dite année 1846, était pour le droit dû par le dit Demandeur aux dits Défendeurs, en vertu du dit règlement, pour la dite année 1846, comme occupant un local situé dans l'arrondissement de la dite cité de Montréal, et par lui occupé et employé pour ses affaires comme Inspecteur de potasse et perlasse pour la dite cité de Montréal, en la dite année 1846, lequel local, sous le nom et description de "Potash Inspection Store, College Street," avait été cotisé et imposé pour la taxe et cotisation municipale, en vertu du dit règlement, pour la dite année 1846, comme étant de la valeur annuelle de £350, cours actuel, ce qui donnait pour le droit pour la dite année 1846, en vertu du dit règlement, la dite somme de £35, à laquelle le dit Demandeur avait été

taxé et imposé comme dit est. Que lors des paiements ainsi allégués avoir été faits par le Demandeur aux Défendeurs dans les dites années 1845 et 1846, le règlement en question était en existence et dans sa pleine force et vertu, ce que le Demandeur devait ou était tenu de connaître, et nommément comme citoyen de la dite cité de Montréal, lesquels paiements avaient été ainsi par lui faits sous l'empire et en vertu du dit règlement, dont le dit Demandeur avait alors connaissance, ou devait et était tenu d'avoir connaissance. Que le dit Demandeur, en faisant alors les dits paiements, ayant eu connaissance du dit règlement, s'était sciemment et volontairement soumis aux dispositions du dit règlement, et était non fondé et non recevable à revenir contre les dits paiements, et à demander le remboursement des dites sommes d'argent, ainsi par lui payées, en vertu du dit règlement, dont il n'avait jamais contesté la validité, et dont il ne contestait pas la validité, même par sa dite action et demande, ainsi qu'il était tenu et obligé de le faire.

20. Une défense en fait.

Au soutien de leurs exceptions péremptoires et fins de non-recevoir, les Défendeurs produisirent le règlement du conseil de la corporation de la dite cité, en date du 29 avril, 1845, No. 162, invoqué dans leurs dites exceptions péremptoires et fins de non-recevoir.

Aux exceptions péremptoires et fins de non-recevoir plaidées par les Défendeurs, le Demandeur opposa une réponse spéciale, par laquelle il dit que la section 43 du règlement invoqué par les Défendeurs, comme ayant été fait par le maire, les échevins et les citoyens de Montréal, assemblés en conseil, le 29 avril, 1845, et suivant et conformément à la loi et au statut en tel cas fait et pourvu, était, au contraire, dans son esprit et dans ses effets, en contradiction directe à l'esprit et à la lettre des statuts de la 6^e Vict. ch. 6, et 8 Vict.

ch. 59, et que la dite section 43, du dit règlement, était nulle et de nul effet, et l'avait toujours été, comme étant une violation des lois et statuts existants pour régler l'inspection de la potasse et perlasse, et pour l'incorporation de la cité de Montréal, attendu que le dit Demandeur, comme Inspecteur de potasse et perlasse pour la dite cité de Montréal, ne pouvait être ni cotisé ni taxé, n'étant point du nombre des personnes que les dits Défendeurs pouvaient cotiser et taxer conformément à la loi. Que la dite section du dit règlement n'avait jamais donné aucun droit aux dits Défendeurs de faire payer au dit Demandeur les dites sommes de £30 et £35, mentionnées dans la déclaration de lui le dit Demandeur, et que les ayant payées sans droit et sans cause, il avait bien le droit d'en demander le remboursement.

Dans cette réponse spéciale, le Demandeur conclut purement et simplement au renvoi des exceptions péremptoires.

A cette réponse spéciale, les Défendeurs répliquèrent en maintenant la légalité et validité du règlement, et niant au Demandeur le droit d'invoquer la nullité de ce règlement, de la manière qu'il le faisait dans sa réponse spéciale.

L'enquête ou preuve, sur la contestation soulevée entre le Demandeur et les Défendeurs, consiste dans les admissions faites par les parties de part et d'autre.

Le deux septembre 1850 la Cour rendit le jugement suivant :

“ The Court having heard the parties by their Counsel,
 “ examined the proceedings and proof of record, and having
 “ upon the whole maturely deliberated, considering that the
 “ Plaintiff hath failed to establish any error of law from
 “ which any legal cause of action could arise, and consider-
 “ ing that the payment by the said Plaintiff to the said De-

"fendants, of the amounts of the two several taxes levied
 "on him, for the occupation of the premises occupied by
 "him as an inspection store, was an entirely voluntary pay-
 "ment, without any coercion, or shadow of coercion, on the
 "part of the Defendants, or any deception whatever, and
 "made in virtue of a subsisting by-law, the legality of which
 "was never called in question before the bringing of this
 "present action, and with a full knowledge of the powers
 "vested in the said Corporation and the existence of the
 "said by-law, and considering that by the law incorporating
 "the said city, the Mayor's Court is established for the pur-
 "pose of hearing any contestation which might arise touch-
 "ing the validity or legality of any by-law of the said Cor-
 "poration, the voluntary payment of the said tax by the said
 "Plaintiff, with a full knowledge of all the circumstances
 "and of the law, is tantamount to a waiver on his part of
 "any objection thereto, doth dismiss the said action with
 "costs,"

MONDELET, Justice, dissenting.

SMITH, Juge, en prononçant ce jugement, énonça comme
 principe, que tout paiement fait par une personne qui
 a pu connaître toutes les circonstances sous lesquelles elle
 faisait tel paiement, était valable et ne pouvait être répété.
 Il cita comme précédent la cause de *Elliott vs. Walker*.

C'est de ce jugement que le présent appel était interjeté ;

CHERRIER, pour l'Appelant.

Ce jugement et les prétentions des Défendeurs, qu'il sou-
 tient, sont contraires à l'équité et à la loi et blessent les
 droits constitutionnels de l'Appelant.

Personne ne doit s'enrichir aux dépens du bien d'autrui.
 Un particulier ne peut retenir ce qu'il a reçu ou lui avait été

payé sans cause ni raison. Pourquoi la Corporation aurait-elle un privilège qu'un simple particulier n'a pas ? C'est un corps public nommé pour régler certains droits et devoirs de la communauté, mais non pour spolier et dépouiller ceux qui l'ont constitué, et ce en défiant le texte de lois précises et qui limitent son autorité à de justes bornes.

Son droit de taxer certaines classes de citoyens dans certains cas, doit être restreint dans les limites que la législation lui a tracées ; prétendre ou sanctionner le contraire, serait violer les droits les plus sacrés du citoyen.

La 57ème Section du chap. 59, 8 Victoria, frappe, par avance, de nullité tout règlement de la Corporation qui serait fait contrairement à la loi du pays ; et le règlement du 29 avril 1845, section 43, est en contradiction flagrante avec la 50ème section du statut précité, qui délègue le pouvoir de taxer en certains cas certaines personnes, du nombre desquelles n'est point l'Appelant.

L'Appelant ne peut pas être présumé avoir payé volontairement dans un sens absolu, lorsque l'autorité municipale se présentait chez lui pour lui demander le paiement de sommes d'argent, que la bonne foi qu'il lui supposait lui a fait payer sans difficulté, sous l'impression que la loi lui en faisait un devoir, tandis qu'il n'était que la victime de l'erreur des Intimés qui ont assumé un droit qu'ils n'avaient pas, qu'ils reconnaissent aujourd'hui même n'avoir pas, tout en prétendant néanmoins que l'abus de leur pouvoir doit leur profiter, et que l'Appelant doit souffrir de sa bonne foi.

Prétendre qu'il a voulu donner, serait tout aussi étrange ; un don sous de pareilles circonstances ne peut être présumé.

Les motifs du jugement du 2 Septembre semblent fondés sur ce que l'Appelant ne s'est pas plutôt plaint de l'illégalité du règlement du 29 avril 1845, et que la Cour du Maire,

créée par la 70e section du chap. 59, 8 Victoria, était seule compétente à déterminer cette question. C'est là une erreur. La Cour du Maire a été établie pour un tout autre objet, et il n'y a qu'un Tribunal Supérieur qui pouvait être saisi de la cause actuelle, qui est la seule ressource de l'Appelant pour obtenir le remboursement de ce qu'il a payé.

Sous l'empire du droit romain et de l'ancien droit français, la question du droit de la répétition d'une somme, payée par erreur de droit, a été souvent discutée parmi les jurisconsultes, et le plus grand nombre l'ont résolue dans l'affirmative.

Aujourd'hui en France sous l'empire du code, il n'y aurait que la transaction ou l'aveu judiciaire, qui pourrait faire exception au droit de la répétition d'une somme payée par erreur de droit.

L'on a semblé prétendre, en Cour Inférieure, que pour décider cette cause, il fallait chercher des précédents devant les Tribunaux d'Angleterre et des Etats-Unis, mais l'Appelant soutient avec confiance que les Lois du Pays sont les seules auxquelles on doit avoir recours, et ce d'autant plus qu'elles fournissent des règles sûres, claires et positives pour décider le point en contestation. (1)

(1) Autorités citées par l'Appelant :

6ème Victoria, Chap. 6.

8ème Victoria, Chap. 59, Sections 50-57-70.

Domat.—Des Vices des Conventions, Liv. 1, Tit. 18, Section 1, Articles 14 et 15, p. 138 :

Ibid.—Liv. 2, Tit. 7, Section 1, No. 1, p. 172.

Ibid.—Liv. 3, Tit. 1, Section 1, No. 4, p. 278.

Répertoire de Guyot, Vbo. Erreur, p. 69.

“ On dit en général que l'erreur de droit n'excuse pas, et que l'erreur de fait ne nuit jamais.—Ces deux règles ont besoin d'être expliquées.

Il n'est permis à personne d'ignorer les principes du droit naturel.”

P. 70.—“ Si l'erreur de droit est la seule cause de l'obligation, cette cause se trouvant fautive, l'obligation sera nulle.”

Plus bas.—“ Celui qui reçoit ce qui ne lui est pas dû, n'est pas plus favorable que celui qui paie ce qu'il ne doit pas. Il faudrait dire qu'une obligation peut subsister sans cause ; car c'est la même chose qu'il n'y ait pas de cause, ou que la cause soit fautive ; que la loi punit comme un délit l'erreur de droit, par la perte de la chose qui en a été le sujet, et que celui qui s'est trompé, a mérité d'être dépouillé de son bien, lequel doit rester à celui qui n'y avait aucun droit.”

De la part des Intimés, les propositions suivantes furent soutenues :

10. Qu'il n'y avait aucune preuve de l'erreur alléguée par le Demandeur lors des paiements en question.

Daguesseau, Vol. 5. Dissertation sur l'erreur de droit.

P. 471.—Art. 3.—Nulle obligation sans cause.—Art. 4. *Quod nullum est, nullum producit effectum* ; donc ; *si ab initio non constituit obligatio, quia sine causa promissum est ante solutionem, ipsa obligatio, post solutionem, quantitas soluta condicetur.*

P. 473, Art. 9. Daguesseau soutient que l'erreur de droit ne peut pas plus profiter à celui en faveur de qui l'on s'oblige, qu'elle ne profite à celui qui contracte.—P. 475.—Il dit : il n'y a rien de plus simple que de donner à la règle de droit toute l'étendue qu'elle peut avoir :

Error juris in compenditis non prodest, donc, neque reo neque stipulanti prodest ; à l'un, parce qu'il n'est pas juste que sa faute lui serve, et qu'il profite de l'erreur dont il est coupable ; à l'autre, parce qu'il ne saurait trouver dans tout le droit une seule loi qui nous apprenne, que l'erreur d'autrui soit, par elle-même, et déstituée de toute autre cause, un titre légitime, et une juste voie pour acquérir. S'il s'agit d'acquérir, l'erreur de droit n'est ni une excuse, ni un titre.

Code de la Louisiane, Art. 1840.

Dalloz, dictionnaire de droit, Vol. 4, vbo. Répétition, P. 207, No. 50. La répétition a lieu lorsque le paiement n'a été fait que par suite d'une erreur de droit. Il n'y a pas plus de distinction à faire entre l'erreur de fait et l'erreur de droit quand elle a donné lieu à un paiement, que lorsqu'elle a déterminé la formation d'un contrat.

3 Delvincourt, p. 449.

10 Dalloz, p. 448.

10 Dalloz, p. 779. Du paiement de la chose non due, art. 2, No. 2.

" A cet égard, l'ancienne école était divisée : nous avons parlé de cette question en examinant les effets de l'erreur dans le consentement donné à la formation des contrats. Nous croyons qu'il n'y a pas plus de distinction à faire entre l'erreur de fait et l'erreur de droit quand elle a donné lieu à un paiement, que lorsqu'elle a déterminé la formation d'un contrat."

10 Duranton, Liv. 3. Manières d'acquérir la propriété. Depuis No. 106 à 128, 129, pp. 98, 100, 101.

Merlin, Rép. Vbo. Restitution de droits indument perçus,

" Il arrive quelquefois que les préposés des administrations des douanes, &c., &c., perçoivent ou des droits qui ne sont pas dus ou des droits plus forts que ceux dont la loi autorise la perception."

" Dans ces cas, les personnes qui ont payé indument ont une action pour se faire restituer ce qu'elles n'ont pas dû payer," &c., &c.

7 Denisart, Vbo. Erreur., § 3, No. 2, p. 757. Il finit par citer Daguesseau et Domat.

11 Toullier, Du Quasi-Contrat. Nos. 63-70-71-72 dit que " toute l'ancienne école pensait que l'erreur de droit ne s'opposait point à la répétition de ce qu'on avait payé sans le devoir.—Cujas, Chef de la Nouvelle et ses Sectateurs embrassèrent une opinion contraire. Mais Vinnius et autres, et sur tout notre célèbre Chancelier Daguesseau, ont soutenu fortement la première

20. Que cette erreur, en supposant qu'elle ait existée et qu'elle eut été prouvée, ne peut être qu'une erreur de droit qui ne donnait pas un droit légal d'action au Demandeur contre les Défendeurs.

30. Qu'en supposant qu'il pourrait y avoir certains cas où l'erreur de droit donnerait lieu à la répétition de ce qui aurait été payé par erreur de droit, les paiements faits par le Demandeur ne tombent dans aucune de ces catégories.

40. Que les paiements faits par le Demandeur sont des paiements volontaires, et doivent être considérés comme tels, ayant été faits sans aucune protestation de sa part, (et sans aucune fausse induction ou impression de la part des Défendeurs, au moins il n'y en a aucune preuve) et sous l'opération d'un règlement, d'une loi municipale que le Demandeur était tenu et obligé de connaître comme étant lui-même un des membres de la corporation pour laquelle telle loi municipale était faite et promulguée, laquelle loi était en force lors de ces paiements.

50. Que lors même que l'on ne pourrait pas considérer ces paiements comme des paiements volontaires, mais bien comme faits sous une erreur de droit, cependant, d'après la nature de l'objet pour lequel étaient faits ces paiements, et l'emploi auquel étaient destinées les sommes payées par le Demandeur en 1845 et 1846, le Demandeur ne pouvait point en demander la répétition de la manière et dans le temps qu'il l'a fait. (1)

"opinion, et combattu la seconde avec tout le poids des armes de la raison. C'est leur doctrine qu'ont suivie les rédacteurs du Code."

Plus bas. "Il faut donc s'en tenir à la règle générale. La répétition doit être admise sans distinction, soit que le paiement ait eu lieu par erreur de fait ou par erreur de droit."

18 Revue de Jurisprudence, p. 176.

Angell and Ames, Law of Private Corporations, pp. 331-336.

4 Championnière et Rigaud, Droits d'Enregistrement, pp. 33-913, No, 70.

Wilcock on Corporations, p. 181, No. 454.

(1) Autorités citées de la part des Intimés :

Jugement en appel.

La Cour considérant que la Sect. 43, du Règlement sous le No. 162, fait et passé par le maire, les échevins et les citoyens de la cité de Montréal, le 29 avril, 1845, imposant une taxe de £10 par chaque £100 de la valeur cotisée sur toute et chaque voûte ou hangar d'inspecteur dans la cité de Montréal, employés aux fins de leurs affaires par les inspecteurs de potasse, perlasse et autres, outrepassa les attributions et pouvoirs accordés aux Intimés par le Statut de la 8 Vict. chap. 59, et partant est nul et de nul effet; vu qu'il est en preuve que les deux sommes d'argent réclamées en cette cause par l'Appelant, ont été reçues par les Intimés, et payées par l'Appelant en obéissance à la dite Section du dit Règlement, comme si elles étaient légalement dues, quoiqu'en point de droit icelles sommes n'étaient pas dues, la Cour renvoie l'Exception des Intimés par laquelle ils ont prétendu la validité du dit Règlement et le droit de se faire payer les dites sommes; et vu qu'en payant icelles sommes l'Appelant n'a ni voulu en faire donation aux Intimés ni transiger, et que sans être précisément persuadé qu'il les devait, il a pu seulement le présumer, en conséquence des prétentions des Intimés d'avoir le droit de lui imposer une taxe en sa qualité d'inspecteur de potasse ou de perlasse; vu que nonobstant l'erreur de droit qui a engagé l'Appelant à payer les dites sommes, la voie de la répétition lui est ouverte, en autant qu'il s'efforce d'obtenir ce qui lui appartient, tandis que les Intimés désirent faire un profit à son détriment, et que les Intimés ne peuvent pas, en bonne conscience, retenir en caisse les dites sommes, après que la nullité de leur dit Règlement a été jugé, contradictoirement avec le dit Ap-

Pothier, *Condiction indebiti*, No. 162 :—Domat, *Des vices des Conventions*; Tit. 18, Sect. 1, Art. 13 :—Idem—Tit. 7, Sect. 1, Art. 5 :—Nouv. Denisart, vbo. Erreur p. 556 :—Marlin, *Question de droit*, vbo. Contribution Foncière, p. 641.

pelant : la Cour infirme le jugement dont est appel, et condamne les Intimés à payer à l'Appelant la somme de £65, avec dépens.

LA FONTAINE et BERTHELOT, Procs. de l'Appelant,
CHERRIER, C. S. Conseil.

PELLETIER et BOURRET, Procs. des Intimés.
DUNKIN, Conseil.

SUPERIOR COURT.—QUEBEC.

Before BOWEN, Chief Justice, DUVAL & MEREDITH, Justices.

No. 1208 { CARON.....*Plaintiff*,
of { vs.
1851. { MICHAUD.....*Defendant*.

Held, that in a case, where the relations of a party may be heard to prove facts which have occurred in the interior of a family, nevertheless, if any other of the facts in the cause can be established by witnesses who are not related, and such witnesses are not called, the proof will be deemed insufficient.

Jugé, que dans une cause où les parents des parties peuvent être entendus comme témoins pour prouver des faits domestiques, néanmoins, si aucun des autres faits dans la cause peuvent être prouvés par des témoins étrangers, et que ces témoins ne soient pas appelés, la preuve sera regardée comme insuffisante.

Judgment the 23d December, 1851.

The action in this cause, which was evoked from the Circuit Court of the Kamouraska Circuit, was brought in damages alleged to have been suffered by the Plaintiff, by reason of the birth of a natural child, in consequence of her connexion with the Defendant ; the plea to this action was the general issue. The *Enquête* was taken under a Commission issued in the cause ; under this Commission four witnesses were examined ; namely, the Plaintiff herself, her father, one of her brothers, and one of her sisters, and lastly,

the medical man who attended at her lying-in. Upon the publication of the Commission, the Counsel for the Defendant moved to reject the evidence of the four witnesses first mentioned, upon the ground that they were related to the party Plaintiff *au degré prohibé*.

The Court, on rendering judgment dismissing the action, said that, although in cases of this description the relations of the parties might be heard as witnesses, there were facts which could and ought to be proved by witnesses not related to the parties ; this had not been done in the present case. With the exception of the medical man, who proved the illness of the Plaintiff, all the witnesses were related to the Plaintiff, who had been herself examined as a witness in the cause. (1)

La Cour, &c., considérant que les témoins entendus en cette cause à l'appui de la demande, sont des parents de la Demanderesse, et que les principaux faits constatés par leurs témoignages ne sont point des faits domestiques, qui se sont passés dans l'intérieur de la famille, et dont les étrangers ne peuvent être présumés avoir eu connaissance : considérant que sans les témoignages ainsi rendus par les dits parents de la Demanderesse, il n'y a aucune preuve des allégués de la déclaration : déboute la Demanderesse de son action, le Juge-en-chef *dissentiente*.

BURROUGHS & TACHE', for Plaintiff.

TASCHEREAU, for Defendant.

(1) 9 Toullier, No. 283 :—Fournel, Tr. de la séduction.

No. 763 { **PARADIS.....Demandeur,**

vs.

de { **ALAIN.....Défendeur,**

et

1851 { **ZEAU.....Adjudicataire et**
Opposant à la délivrance.

The sale of immoveable by the Sheriff, which does not contain the extent of ground described, gives the purchaser the right of demanding a reduction of the price proportionate to the extent of ground deficient.

L'adjudicataire, Thomas Zeau, après l'adjudication à lui faite, informé qu'une partie de la terre à lui adjugée par le Shérif en cette cause, était en la possession d'une tierce personne qui avait un titre légal à cette partie de la propriété, fit faire un arpentage, dont le résultat fut d'établir un déficit dans l'étendue du terrain décrit par les avertissements du Shérif.

En conséquence de ce défaut de contenance, l'adjudicataire forma opposition réclamant sur le prix d'adjudication, par priorité à tous autres créanciers, la somme de £12 10s., valeur du déficit.

Par le projet de distribution, rédigé par le protonotaire, il fut colloqué pour cette somme.

Le Défendeur contesta alors l'opposition de l'adjudicataire, alléguant 1o. que par la loi cette opposition n'était pas

recevable, et qu'elle n'était pas fondée en droit ; (1) 2o. que l'avertissement du Shérif, désignant la propriété comme ayant 1 arpent 4 perches et 9 pieds *ou environ* de front, l'adjudicataire n'avait pas été induit en erreur, et ne pouvait réclamer ainsi qu'il le faisait ; 3o. que l'adjudicataire connaissait le déficit avant l'enchère, et qu'il n'était pas recevable à s'opposer.

Après une enquête, l'opposition fût plaidée au mérite, et par son jugement interlocutoire la Cour ordonna que, par experts, la proportion du déficit serait établie, et déclara que l'adjudicataire dans un décret forcé, avait droit à une diminution du prix de vente au *pro rata* du déficit.

LANGLOIS, pour le Défendeur, prétendit que l'expert ayant constaté la valeur du déficit, sous le rapport de l'étendue, à 1-17 $\frac{1}{4}$ du tout, ce déficit était, quant au tout, de si peu d'importance que la Cour ne devait y faire aucune attention. (2)

Les termes du jugement sont comme suit :

La Cour, vu les plaidoyers et la preuve de record, et après avoir entendu les parties finalement sur le mérite de la contestation liée entre le Défendeur et Thomas Zeau, Opposant afin de conserver et adjudicataire en cette cause, ordonne que par experts la valeur du terrain décrit en l'opposition du dit Thomas Zeau, et dont il est devenu adjudicataire, non livré au dit adjudicataire, soit établie eu égard au prix d'adjudication du dit terrain en son entier.

Autorités citées par l'Opposant : (3)

BELLEAU, Procureur de l'Opposant.

CASAULT et LANGLOIS, Procureurs du Défendeur contestant l'opposition.

(1) 1 Revue de Jurisp. p. 179, Lloyd et Clapham,

(2) Duranton, Vente, No. 1225-9 :—Pothier, Vente, Nos. 253-258 :—2 Guyot, Rép. vbo. Vente, p. 481,

(3) Duvergier, Vente, No. 300 :—Pothier, Traité de la Procédure Civile, chapitre 11, section 7, page 254 ; de l'effet de l'adjudication :—1 Troplong, Vente, Nos. 92, 433 :—Duranton, No. 265, sur l'Article 731, du Code de Procédure :—Domat, Vente, Titre II, Section 9, § 14, page 49.

COUR SUPERIEURE.—QUEBEC.

Présents : BOWEN, Juge-en-Chef, DUVAL et MEREDITH, Juges.

No. 2195	{	NADEAU,.....	<i>Demandeur.</i>
de		DUMON,.....	<i>Défendeur.</i>
1852.		DIVERS,.....	<i>Opposants.</i>

vs.
et

Jugé, que pour la conservation des droits de propriété, il n'est pas nécessaire d'enregistrer les contrats de mariage dont ils résultent, et que conséquemment, des enfants représentant leur mère, peuvent réclamer la valeur de la moitié d'un propre ameubli, à titre de communs, lequel ils auraient laissé vendre.

Held, that it is not necessary to register contracts of marriage to preserve rights of ownership thereby secured, and that children, representing their mother, may claim, by right of community, the value of one half of an immoveable, *propre ameubli*, which they have allowed to be sold.

Jugement rendu le 26 avril, 1852.

Le 3 novembre, 1823, Ignace Dumon et Dame Marie Leclaire, stipulent par leur contrat de mariage, communauté de biens, avec clause d'ameublissement général. L'épouse meurt, et ses enfants, acceptant la communauté, réclament, par une opposition afin de conserver leur part de communauté, et notamment la valeur de la moitié d'un immeuble dépendant de cette communauté, en vertu de cette clause d'ameublissement. Ed. Lagueux, un créancier du Défendeur, leur objecte que le contrat de mariage n'a pas été enregistré.

La question est soumise à la Cour au moyen d'une contestation du rapport de distribution filé dans la cause, qui colloquait les héritiers Dumon.

Taschereau, J. T. pour les Opposants Dumon :—La première question à décider est de savoir si le contrat de mariage, en autant qu'il a rapport à la réclamation des enfants Dumon, ne doit pas être considéré comme un titre

translatif de propriété, et la seconde si, étant titre translatif de propriété, et antérieur à l'Ordonnance des Bureaux d'Enregistrement, il n'est pas exempt des formalités de l'enregistrement ?

MEREDITH, Juge :—Nul doute que les actes translatifs de propriété, antérieurs à l'Ordonnance, ne soient exempts des formalités de l'enregistrement. La 1ère section de l'Ordonnance 4 V. c. 30, qui a rapport aux nouveaux actes, énumère les actes qui comportent l'aliénation des immeubles dans la catégorie des actes à enregistrer : il n'en est pas ainsi de la 4ème Section, qui a trait aux anciens actes : tous les termes, qui comportent l'idée d'aliénation, y sont omis : les mots *conveyance* et autres du même genre ne s'y trouvent pas. Evidemment la 4ème Section n'exige que l'enregistrement des actes constitutifs d'une dette ou créance, à l'effet de conserver l'hypothèque. Dans la réclamation des enfants Dumon, comme dans le contrat de mariage sur lequel ils la fondent, il y a bien un droit de propriété : il n'y a point assurément de dette ou créance.

TASCHEREAU.—Le droit de propriété réclamé par les enfants Dumon existerait également par rapport aux conquêts, quoiqu'il n'y eut pas de contrat de mariage, et conséquemment de document à enregistrer.

DUVAL, Juge :—La raison de douter est que par le défaut de l'enregistrement, partie du contrat de mariage serait de nul effet, et partie serait valable, ce qui semble anomal.

TASCHEREAU :—S'il y avait dans ce contrat une donation non insinuée elle pourrait être nulle sans que les autres stipulations en fussent affectées.

MEREDITH, Juge :—Il en serait ainsi d'un contrat de vente, non enregistré, antérieur à l'Ordonnance, il serait

valable comme titre translatif de propriété, quoique de nul effet quant à l'hypothèque du vendeur.

GAUTHIER, pour l'Opposant Lagueux :—Ce n'est que par la stipulation contenue au contrat de mariage que les propres, dont les enfants Dumon réclament la moitié, ont été ameublis. La nature de cet immeuble a été changée, et les tiers sont intéressés à le savoir. J'estime que cette réclamation se trouve comprise dans le terme général de "Droits" dont il est fait usage dans la 4ème Section.—La cause de Girard vs. Blais, (L. C. R. V. 1, p. 47) n'est pas applicable. Dans cette cause, il s'agissait de la réclamation d'une femme qui, ayant renoncé à la communauté, réclamait ses propres à elle, qu'elle avait ameublis, il est vrai, mais dont elle avait stipulé la reprise au cas de renonciation. Dans ce cas, il s'agissait évidemment d'un droit de propriété.

MEREDITH, Justice :—We have already held in several cases, that all privileged and hypothecary rights resulting from marriage contracts executed before the passing of the Registry Ordinance, were subjected to the formality of registration, by the fourth section of that law ; and we regard it as indisputable, that the formality of registration was not rendered necessary, as regards rights of ownership, *droits de propriété*, acquired before the Registry Law came into effect.

The decision of the present controversy must therefore depend upon this single question :

Was the right acquired by Marie Leclair, under her marriage contract, to the property in question, and which upon her death passed to her heirs, a right of ownership, *droit de propriété* ?

The effect of the *clause d'ameublisement général* was to make the property in question, which otherwise would have

remained the exclusive property of the husband, the joint property of the husband and wife ; and upon the death of the wife, one half of the property in question vested by mere operation of law in her heirs. (1) The interest which the wife thus acquired, and which afterwards passed to her heirs, was plainly something more than a mere privilege or hypothecary right, it was a right of ownership, (2) and having been acquired under a contract executed before the Registry law came into effect, was not subjected to the formality of registration.

Consequently, the contestations founded on the non-registration of the marriage contract must be dismissed.

Had the *clause d'ameublisement* been *indéterminée*, the case might have presented some difficulty, but as to the effect of a *clause d'ameublisement général* or *déterminé*, I think there cannot be any doubt.

Le jugement est en faveur des enfants Dumon. Il est motivé comme suit :

La Cour...., considérant que les droits des Opposants ne sont pas des droits hypothécaires, mais des droits de propriété ; que ces droits résultent du contrat de mariage d'Ignace Dumon et Dame Marie Leclair, son épouse, en date du 3 Novembre, 1823, et qu'il n'était point nécessaire de faire enregistrer ce contrat, pour conserver les droits de propriété qui en résultaient, renvoie les contestations des collocations des enfants Dumon, avec dépens.

GAUTHIER et LEMIEUX, pour E. Lagueux.

TASCHEREAU, pour les Opposants Dumon.

(1) Art. 229, C. de P.

(2) 2 Ferrière, Coutume de Paris, p. 63—sur l'article 220. § 2 des ameublissements No. 6—" En effet, l'ameublisement étant une aliénation, une espèce de vente que la femme fait à son mari, ou le mari à sa communauté, &c :— 3 Troplong, Contrat de mariage, p. 500, No. 1884 :—Pothier, Communauté, No. 307 à 310.

SUPERIOR COURT.—QUEBEC.

Present: BOWEN, Chief Justice, DUVAL and MEREDITH,
Justices.

No. 1734 { CASEY.....*Plaintiff*,
of vs.
1851. { GOLDSMID *et al.*.....*Defendants.*

A Policy of Insurance, describing the premises as a house, bounded in rear by a stone building covered with tin, and by a yard, in which yard there was being erected a first class store which would communicate with the building insured, held to be incorrect, and therefore null, it being proved that there was between the house and the stone building, a brick building, covered with shingles, communicating to both by doors.

Une police d'assurance, décrivant la propriété assurée comme une maison, bornée en profondeur par un hangar en pierre couvert en fer-blanc, et par une cour où l'on construit un hangar de première classe qui communiquera avec la maison assurée, jugée incorrecte, et nulle, parcequ'il était prouvé, que entre la maison et le hangar il y avait un autre bâtiment couvert en bardeaux, communiquant par des portes aux deux autres bâtiments.

Judgment 13th day of January, 1852.

This action was brought by the Plaintiff against the Defendants, a foreign Insurance Company, carrying on business at Quebec, under the name of "The Globe Insurance Company," upon a Policy of Insurance, dated the 21st day of June, 1850, reciting therein that the Plaintiff had paid to the Defendants, for premium, to the 30th day of May, 1851, £11, for carpenters at work, £1, and for policy, 5s., (the said sum of £11 to be paid yearly during the continuance of the said policy,) for the insurance from loss or damage by fire to the amount of £1000 currency, *on goods and merchandizes, contained in a building three stories high, and a garret, built with stone and covered with tin, clapboarded on one side, owned by the Seminary of Quebec, and occupied by the assured as a dry goods store and dwelling, and by James Hazlett, as a grocery store and dwelling, situated in Fabrique street, Up-*

per Town, Quebec, forming the corner of Hope street and Fabrique street, bounded on one side by a similar class house, occupied by J. S. Auld, saddler, and in rear by a stone building, covered with tin, occupied by the assured as a store, stable and coach-house, and by a yard, in which yard there was being erected a first class store, which would communicate with the building insured; (carpenters allowed to be at work for one month.)

The Plaintiff alleged, that on the 27th day of July, 1850, there were in the said building, goods to the full amount insured, and that on the same day the said building was destroyed by fire, and the Plaintiff sustained a loss to the amount of £449 10s 8d. The Plaintiff further alleged a compliance on his part with the conditions set forth in the policy, and concluded for the sum of £475, with interest and costs.

To this Action the Defendants pleaded, 1o. that the premises insured were improperly and insufficiently described in the Policy of Insurance, and 2o. that the Plaintiff had had carpenters at work after the 1st day of July, 1850, to wit, after the month allowed him to have carpenters at work had expired. The plea is as follows:

1st—That the house and premises, wherein the goods, wares and merchandize were, were fraudulently described and represented by the Plaintiff as bounded in rear by a stone building covered with tin, and occupied by the Plaintiff as a store, stable and coach-house, and so described in the Policy of Insurance, whereas in truth and in fact the said house wherein were contained the said goods, wares and merchandize, was bounded in rear by a stone store covered with wood, in which said last mentioned store the fire, which consumed the house wherein the said goods, wares and merchandizes so insured were, originated, and

communicated from the said store to the said house, by means of a door or communication between the said last mentioned store and the said house, which said door or communication was falsely and fraudulently omitted to be mentioned by the said Plaintiff to the said Defendants, before and at the time of effecting the insurance by him mentioned in his declaration in this cause. That by means of such fraudulent representations and suppressions, the said Plaintiff hath no right of action against the said Defendants for the supposed loss and damage in the declaration mentioned.

2. That the said stone store, so covered with wood, communicated by means of a door or aperture with a certain other stone store in the yard, which said communication was falsely and fraudulently suppressed by the Plaintiff, and wholly omitted to be mentioned to the Defendants by him the Plaintiff, before or at the time of effecting the insurance by him alleged in and by his declaration in this cause, and which door or aperture and communication materially enhanced, altered and increased the risk so alleged by the Plaintiff to have been assured by the Defendants, in and by his declaration, and further that the fire which is supposed to have caused loss and damage to the Plaintiff, as stated by him in his declaration, originated in and about the said door, aperture or communication between the said stores, and communicated from the one store to the other by or through the door, aperture or communication last aforesaid, and from thence to the house wherein the said goods, wares and merchandizes were. That by means of such fraudulent suppression as aforesaid, the said Plaintiff hath no right of action against the Defendants for the supposed loss or damage so alleged to have been sustained by him.

3. That in and by the insurance effected by the Plaintiff with the Defendant, he, the said Plaintiff, was allowed and authorized to have carpenters at work for one month, to wit,

up to the first day of July then next. That the Plaintiff was bound for such permission to pay an extra premium, which premium he, the said Plaintiff, did, before and at the time of effecting his insurance, pay, but that the Plaintiff long after the said first day of July, and up to and at the time of the said fire, had carpenters engaged at work in and about the said house and premises, wherein the goods, wares and merchandize so insured as aforesaid were ; and that the said Plaintiff wholly failed to obtain permission from the Defendants to have carpenters working thereat after the said first day of July, and failed to pay the usual and customary premium to the Defendants for such additional risk ; by means whereof his insurance became void, and the risk assured and taken by the Defendants came to be and was enhanced, altered, changed and much increased, by means of which said premises, the Plaintiff hath no right of action against the Defendants for his said supposed loss and damage.

4. That before and at the time of effecting the insurance mentioned in the Plaintiff's declaration in this cause, he the Plaintiff represented and undertook, that the store then building in the yard, should and would be erected and finished on or before the first day of July then next, whereupon the Defendants authorized and allowed the Plaintiff to employ carpenters at work for one month, but that the said store was not so erected and finished by or before the first day of July then next, but on the contrary long after the said first day of July, and down to and at the time of the fire alleged in and by the declaration in this cause, the Plaintiff had carpenters at work at the said store employed in and about the erection and completion of the same ; by means of which premises the Plaintiff hath no right of action against the said Defendants, for the supposed loss and damage mentioned in his declaration in this cause.

After issue had been joined on this plea, and after an order for a trial by Jury, the Plaintiff and Defendants admitted the execution of the Policy, that on the 27th July, 1850, the building containing goods insured was destroyed by fire, and that the Plaintiff within fifteen days delivered in his account, &c.

Under the new Jury law (1) it became the duty of two Judges to settle the questions that were to be put to the jury, upon the issues raised by the parties, and this was done by submitting to the jury the following questions :

1. What was the value of the goods, wares and merchandize, of and belonging to the Plaintiff, insured by the Policy, alleged in the Plaintiff's declaration, which were destroyed by the fire which occurred on the 27th July, 1850, in the building described in the said Policy?

2. What is the amount of the damage and loss sustained by the Plaintiff on the goods, wares and merchandize insured by the aforesaid Policy, which were saved from the said fire?

3. Was the description given by the insured of the aforesaid building, containing the said goods, wares and merchandize, correct? If not, in what particular was it incorrect?

4. Was there, at the time of the aforesaid fire, a door or aperture communicating between the stone store, given as a boundary in the said Policy, and another store in the yard, in the rear of the said building?

5. Was the fire communicated from one of the said stores to the other, through this door or aperture?

6. Did this door or aperture alter or increase the risk in the said Policy contained?

(1) 14th and 15th Vict. c. 89.

7. Was the store, in progress of erection at the time the said Policy was subscribed, finished and completed at the time the said fire took place? Or, were carpenters employed at work in the building containing the above mentioned property insured, at the time the said fire took place?

At the trial, the following facts were proved :

“ There was a brick store extending from the house insured to the stone hangar, at the extremity of the yard.
 “ This brick store was covered with shingles; there was a
 “ communication door from the house in Fabrique street for
 “ this store, both from the ground flat and second flat. There
 “ was a communication door between this store and stone
 “ hangar, in the lower flat. The carpenters had been at work
 “ the day of the fire, at the new building in the yard, which
 “ was in course of erection. The new store in progress of
 “ erection, in the yard, was constructed of brick. The last
 “ day that a carpenter had been at work on these premises
 “ was on the day previous to the fire, he put up some
 “ trimmings to the inside part of the door, these trimmings
 “ were made in the stone hangar. The carpenters’ work,
 “ with the exception of this, had been finished three weeks
 “ before. The trimmings were three boards, one at each
 “ side of the door, and one at the top, which is called the
 “ lining, which were nailed up, and was a work of about
 “ fifteen minutes, these are the boards which were made at
 “ the stone hangar below. The house communicated with
 “ a brick store, covered with shingles, and this brick store
 “ communicated again with a stone store covered with tin.
 “ Communication doors between different buildings form an
 “ essential ingredient in estimating premium of insurances
 “ on buildings, and do, of course, increase the risk. Stables
 “ are considered as additional risks, and an additional
 “ premium is charged for them, and the circumstance of a
 “ stable communicating with a dwelling house does deci-

"dedly create an additional risk. The fire in question
"originated in the stone hangar."

DUVAL, J. charged the Jury, and they returned the following verdict :

1. "The value of the goods and merchandize belonging to Plaintiff, insured by the Policy of Insurance in this cause mentioned, destroyed by the fire in question, is of £382 16s 4d currency, from which sum must be deducted £20, leaving £362 16s 4d currency.

2. The amount of the loss sustained by Plaintiff is £61 14s 3d currency, and £5 costs, incurred in the valuation of the said goods.

3. Yes.

4. Yes ; there was a door, as mentioned in this question.

5. The fire originated in the brick building in the rear, adjoining the stone hangar, and we are of opinion that the fire communicated from one of the said hangars to the other by the door above mentioned.

6. The door increased the risk as stipulated in the said Policy of Insurance.

7. The said hangar was not complete and finished when the fire that destroyed the goods, on the 27th July, 1850 took place ; there were no carpenters employed in the building where the goods were, when the fire broke out."

The difficulty presented by this verdict was, the apparent contradiction between the 3d answer and the 4th and 6th answers.

BOWEN, C. J. : There is an apparent contradiction in the verdict, upon which we must put a reasonable interpretation.

There is no doubt that the brick building, covered with shingles, omitted in the Policy of Insurance, increased the risk ; and the Jury have said so. It is true that in a portion of their verdict, the Jury have said that the description in the Policy of Insurance was correct, but when they enter into particulars, they state quite the contrary. By reason of this omission, judgment must go for the Defendants.

DUVAL, J. At the trial of this cause, we had some difficulty in obtaining an accurate description of the premises in which were the goods insured, but as soon as a correct description was given, I entertained no doubt as to the result of the trial.

It will be admitted that the insured must give an accurate description of the construction of the premises and goods to be insured, that he must communicate all facts that are material to the risk, and which are not known, or presumed to be known to the insurers. Applying this rule to the present case, I say it is impossible for any person who has read the evidence attentively not to see that the insured omitted to make known to the insurers a fact which greatly increased the risk, and that by reason of this omission the Defendants are not bound to pay the loss sustained by the Plaintiff by the fire which took place on the 27th July, 1850.

It is pretended that the Jury have not found this fact. I say they have, and that expressly. The 4th question submitted to them is in the following words : "Was there, at the time of the aforesaid fire, a door or aperture communicating between the stone store, given as a boundary in the said Policy, and another store in the yard, in the rear of the said building ?" Their answer is, "Yes ; there was a door as mentioned in this question." Have not the insurers, this day, the right of referring to the Policy of Insurance, and of saying, the insured did not make known to us this essential fact,

which the Jurors have said increased the risk we assumed? But the Plaintiff tells us this finding is inconsistent with the answer given to the 3d question. If it were so, I do not understand on what ground the Plaintiff can demand that Judgment be pronounced in his favor. He must come before us with a clear case—he must prove the truth of his own allegations, and if the answers given by the Jurors are inconsistent, this, in my opinion, would afford a conclusive argument against the motion of the Plaintiff for a Judgment against the Defendants.

But I do not find any such inconsistency in the answer of the Jurors. With a view to a right understanding of the answer given, we must bear in mind that several questions were put to the Jurors at the same time. It was quite reasonable for them to expect that all the answers being read, the one should be received as explanatory of the other. When, therefore, the 3d question was put to them, they did not make mention of the door, because they knew that this particular fact was to be stated in answer to the fourth question. Indeed, they could not have made mention of the door in answering the 3d question; because this latter question refers to the building containing the goods, wares and merchandize insured, and the *door* of which they make mention in their answer to the 4th question, is one *communicating between the stone store and another store in the yard*. It is only by confounding the dwelling house in the front with the two stores in the rear that any argument is afforded for this alleged inconsistency; but an attentive reading of the answers to the two questions must satisfy any disinterested person that there is neither inconsistency nor contradiction in the finding.

Under these circumstances, it appears to me now, as it did at the trial, that the Plaintiff has no claim against the insurers, and, I will add, equally plain, that if the verdict is as repre-

sented by the Plaintiff, then no Judgment can be pronounced in his favor.

MEREDITH, J. : A party insuring moveables is bound not only to give a true description of the building containing the property insured, but also to disclose all material facts known to him, and of which the insurers may be presumed to be ignorant. By material facts, in this respect, are meant all those which, if communicated to the insurer, would induce him, either to refuse the insurance altogether, or not to accept it unless at a higher rate of premium (1). Alauzet says :
 “ Les déclarations ne doivent pas comprendre seulement la
 “ désignation exacte de la chose assurée, mais encore les
 “ circonstances étrangères de nature à modifier l'opinion des
 “ risques.” (2)

The Jury in the present case, notwithstanding it has been established in evidence, that there was a brick building covered with wood, between the building containing the goods insured, and the stone store covered with tin, given as a boundary in the Policy, and contrary to the Judge's charge, have found that the description given of the building containing the goods, was correct.

It does appear to me that the Jury in considering the third question submitted to them, have attached too restricted a meaning to the words “ description of the building ;” but be this as it may, I think their finding is binding upon us. The Jury have however also found that there was a door communicating between the stone store covered with tin, given as a boundary, and another store “ *in the yard in rear of the said building,*” by which words, in the question, I under-

(1) 1 Arnould, p. 540 (Edition of 1850.)

(2) 2 Alauzet, p. 414 :—Boudousquié p. 79, No. 51 :—Quenault p. 140, No. 174.

stand, "in the yard in the rear of the building containing the goods insured."

The Jury have thus, it appears to me, indirectly found that, although the building, containing the goods insured, was correctly described, yet there was in the yard, in the rear of that building, another store, which, it is important to observe, was not *mentioned in the Policy* ; and they have found directly, that there was a door communicating between the store mentioned in the Policy, and the store not mentioned in the Policy ; and that this fact, which, it is also to be observed, was not disclosed to the insurers, increased the risk contained in the Policy.

The facts, which the Plaintiff thus failed to disclose, must have been known to him, and cannot be supposed to have been known to the Defendants ; and as the Jury have found that the communications from the one store to the other increased the risk, it is to be presumed that, had that fact been disclosed, a higher premium would have been exacted.

I therefore think that there has been, in this instance, a concealment of a material fact, sufficient to vitiate the Policy. There is no reason whatever to suppose that this concealment was intentional on the part of the Plaintiff ; but this in law is unimportant. The consequences are the same, whether the suppression of the truth arise *from fraud*, or merely from negligence, mistake or accident (1). The law of France and the law of England agree on this point (2).

Had the fact been established by the verdict, that *between* the building containing the goods insured, and the store

(1) 1 Arnould. pp. 540. 541.

(2) Grun & Joliat, p. 261, No. 210 :—2 Alauzet p. 425, No. 494. Ed. of 1844 :—1 Phillips, p. 214, Ed. of 1850 :—Hammond, p. 66 :—Quenault, p. 141.

mentioned in the Policy as a *boundary*, there was a brick building *covered with wood*, I would not have felt any hesitation as to the judgment to be pronounced : as it is, although the case, in the shape in which it has come before us, is not free from difficulty, it appears to me, after much consideration, that, for the reasons already mentioned, we cannot maintain the Plaintiff's action.

The motion of the Plaintiff for judgment, pursuant to this verdict, is overruled, and the judgment is in favor of the Defendants, as follows :—

The Court having seen and examined the proceedings had and of record in this cause; more particularly the verdict of the jury in this cause recorded, and having heard the parties by their Counsel respectively, upon the Plaintiff's motion, that judgment be rendered pursuant to said verdict ; considering that, by the verdict in this cause rendered, it is established that at the time the building mentioned in the Policy of Insurance, alleged and in part recited in the declaration in this cause, as containing the goods, wares and merchandizes insured by the Plaintiff, was destroyed by fire, there was a door communicating between the stone store given as a boundary in the said Policy, and another store in the yard in rear of the above mentioned building, which fact was not disclosed to the Defendants by the Plaintiff ; considering that, by the said verdict, it is further established, that the said door increased the risk in the said Policy stipulated, and that by reason thereof the said Policy is void ; considering also that the Policy described the house containing the goods insured as bounded by a yard at the extremity of which was a stone hangar covered with tin, whereas the evidence established that between the stone hangar and the house there was a brick building covered

with wood, communicating with both, of the existence of which building no mention was made in the Policy,— doth dismiss the action of the Plaintiff with costs.

STUART O. for Plaintiff.

STUART and VANNOVUS, for Defendants.

QUEEN'S BENCH. } DISTRICT OF QUEBEC.
APPEAL SIDE.

Before ROLLAND, PANET and AYLWIN, Justices.

1852 { CASEY,.....Plaintiff, Appellant.
and
{ GOLDSMID, *et al.*.....Defendants, Respondents.

Held, that a Writ of Appeal, and not a Writ of Error, will lie in the case of a Jury Trial, when the grievance is not merely an error in a matter of law, and if there is no plea determined by the verdict of the jury, but a final adjudication upon law and fact.

Jugé, qu'il faut un *Writ d'Appel*, et non un *Writ d'Erreur*, (*Writ of Error*) dans le cas d'un procès par jury, si les griefs ne sont pas exclusivement fondés sur une erreur de droit, et si un point de loi n'a point été déterminé par le verdict du jury, mais s'il s'agit d'un jugement final fondé sur le fait et le droit.

Judgment the 1st March, 1852.

This case, (being the one above reported,) having been carried into appeal by Writ of Error, a question arose at the argument, whether the Writ of Error was the proper Writ, and upon this point the following judgment was rendered :

The Court having heard the parties on the issue joined on the Writ of Error in this cause issued, and seen the assignment of errors and answers, and also examined the record and proceedings in the Court below ; considering that for the revision of the final judgment rendered in this cause, on the 13th January last past, no appeal by Writ of Error did lie, under the Statute referred to in the Writ, under which the law, and not the fact, can be drawn in question, there being

no plea determined by the verdict of a jury, but a final adjudication on law and fact, no error being assigned that could be assigned under a Writ of Error as provided for by the said statute—doth quash the said Writ as improvidently issued, and it is ordered that the record be remitted to the Court below, the whole without costs, as the Defendants on the said Writ did not raise any objection thereto : saving to the said Plaintiff in error such other recourse as he may be advised.

O. STUART, for Appellant.

STUART and VANNOVOUS, for Respondents.

BANC DE LA REINE. } DISTRICT DE MONTREAL.
EN APPEL.

Présents : PANET, AYLWIN, VANFELSON et
C. MONDELET, Juges.

{ CHARLEBOIS, Tuteur,..... *Appellant*.
et
{ HEADLEY,..... *Intimé*.

Jugé—1. que la donation par un ascendant d'un des conjoints, en un contrat de mariage, d'un immeuble pour entrer en la communauté, est un ameublement aux termes de la loi ; 2. que tel ameublement n'a d'effet que pour la communauté et vis-à-vis des conjoints ; 3. que cet immeuble conserve sa qualité de propre jusqu'au partage ; 4. que l'autre conjoint étant décédé, et l'enfant, issu du mariage, décédant ensuite sans hoirs de son corps, et avant partage, l'ameublement n'a plus d'effet, et les héritiers collatéraux du conjoint, en faveur duquel l'ameublement a été stipulé, ne peuvent rien réclamer dans cet immeuble.

Held—1. that the donation by an ascendant of one of the *conjoins*, in a marriage contract, of an immoveable, destined to enter into the community, is an *ameublement* within the meaning of the law ; 2. that such *ameublement* has no effect except as regards the community and between the *conjoins* themselves ; 3. that the immoveable preserves its quality of *propre* up to the time of *partage* ; 4. that the other *conjoint* being dead, and the child born of the marriage afterwards dying without issue and before *partage*, the *ameublement* has no longer any effect, and the collateral heirs of the *conjoint*, in whose favor it was stipulated, can claim no rights in such immoveable.

Jugement le 11 mars, 1852.

Par l'action en Cour Inférieure, l'Appellant, comme Tuteur des Mineurs Boivin, revendiquait sur l'Intimé quatre

dixièmes et demi indivis d'un immeuble y désigné, sous les circonstances suivantes :

Le 6 octobre, 1792, Antoine Mallet et Marie Judith Guédry firent des conventions matrimoniales, et à l'acte qui en fut rédigé intervint Joseph Mallet, (père du futur,) qui, en faveur du dit futur mariage promit et s'obligea " donner aux dits " futurs époux, à leur première réquisition, une terre et habitation située à la rivière St. Pierre, etc., laquelle terre," est-il ajouté, "entrera en la dite future communauté."

Le 14 décembre, 1792, le dit Joseph Mallet fit donation entrevifs de la dite terre à son dit fils Antoine Mallet.

La dite Marie Judith Guédry décéda *ab intestat* le 17 février, 1794, laissant pour héritier Antoine Mallet, son fils, auquel son père fut nommé tuteur le 10 juillet, 1795.

Le 11 juillet, 1795, Antoine Mallet, père, survivant et tuteur de son dit fils, fit faire inventaire, dans lequel est mentionné la susdite terre, dont un dixième, y est-il dit, était en la personne du père survivant, propre de la succession de sa mère.

Antoine Mallet, père, convola en secondes noces en 1796, avec Marie Agathe Archambault, duquel mariage est née Marie Agathe Mallet, mère des dits mineurs Boivin, par le mariage de cette dernière avec le dit feu Jean Bte. Boivin en mai, 1824.

Par acte de vente du 26 octobre, 1839, (Bedouin, Notaire,) Antoine Mallet, père, a vendu à l'Intimé tous ses droits, parts et portions dans la susdite terre y désignée, "consistant, en cinq dixièmes et demi indivis, plus en l'usufruit, la vie durant du dit vendeur, des quatre dixièmes et demi restant ;" et il y fut reconnu que les dits cinq dixièmes et demi appartenaient au vendeur comme suit, savoir :

quatre et demi d'iceux en vertu de la communauté entre lui et la dite feu Marie Judith Guédry, dans laquelle communauté la dite terre était tombée par une clause d'ameublement au contrat de mariage, et l'autre dixième comme lui étant échu par la succession de sa mère : et que quant à l'usufruit des quatre autres dixièmes et demi il appartenait au dit vendeur comme héritier du dit Antoine Mallet, son fils.

Il est en outre allégué dans la déclaration, qu'après la mort de la dite Marie Judith Guédry, il n'y a pas eu de partage de la dite terre entre Antoine Mallet, père, et son susdit fils, Antoine Mallet ; et que par conséquent le père étant, à la mort de son fils, son parent le plus proche du côté et ligne d'où venait la dite terre, a succédé dans la propriété de la portion que son fils, comme héritier de sa mère, aurait pu, en vertu de la dite clause d'ameublement, prétendre dans la susdite terre, ou plutôt, comme il n'y a pas eu de partage de la dite terre, le dit propre ameubli n'est jamais sorti des mains du père.

Que toute la terre appartenait donc au dit Antoine Mallet, père, et lui était propre comme lui étant advenue en ligne directe ; et que c'est à tort et par erreur que ce dernier, lors de la dite vente au Défendeur, (l'Intimé,) de cinq dixièmes et demi de la dite terre, croyait n'avoir droit qu'à l'usufruit, sa vie durant, des quatre autres dixièmes et demi de la dite terre ; et comme par suite de cette erreur il n'a vendu que l'usufruit, sa vie durant, de ces derniers quatre dixièmes et demi, il s'ensuit que la propriété d'iceux n'a pas été par lui aliénée, qu'elle est restée dans sa succession, et qu'elle est dévolue aux dits enfants mineurs, ses petits-enfants, comme ses légataires universels.

Le Défendeur, par une exception péremptoire, prétendit que la clause d'ameublement ci-dessus avait eu l'effet, après la mort de Mallet, fils, de faire passer la propriété des

quatre dixièmes et demi de la dite terre sur la tête des héritiers du dit Antoine Mallet, fils, du côté et ligne de sa mère, la dite Marie Judith Guédry.

Une admission des faits, signée par les parties, restreignait la contestation aux effets de l'ameublissement en question.

L'Appelant soutenait : 1. que l'ameublissement n'est qu'une fiction qui n'a lieu que pour le cas de la communauté et pour l'intérêt du conjoint en faveur duquel l'héritage est ameubli : qu'une fiction ne peut pas s'étendre d'un cas à un autre, que lorsque la communauté est dissoute, la fiction de l'ameublissement doit cesser. (1)

2. Que le propre ameubli conserve sa qualité de propre, qu'il ne peut la perdre que par l'effet d'un partage effectif qui le fasse passer réellement, soit en tout, soit en partie, à celui des conjoints au profit duquel l'héritage a été ameubli. (2)

(1) Prost de Royer, Dictionnaire de Jurisprudence, T. 4, p. 578 et 589.
 Bourjon, Tome 1, p. 523 et 524. No. 4 aux notes. p. 419, No. 43.
 Guyot, Repert. vbo. Ameublissement, p. 371 *in fine*.
 Lebrun, Communauté, p. 62, Nos. 15 et 19.
 Bacquet, Droits de Justice, p. 330, No. 352 :—Renusson, Traité des Propres, ch. 6, Sect. 8, No. 30.
 Duplessis, p. 141.

(2) Bacquet, Droits de Justice, p. 339, No. 352.
 Arrêts du 25 janvier 1847, et 15 mai 1592.
 Renusson, Propres, Nos. 30-31-32-33-34 et suiv.
 Arrêts du 7 janvier 1688. Journal du Palais.
 Pothier, Communauté, Nos. 310-312.
 Lacombe, vbo. Ameublissement, p. 36.
 Bourjon, Tome 1, p. 418, Sect. 8, No. 40, p. 419, Nos. 41-42-43-44 aux notes.
 Ferrière, Cout. Paris, Art. 326, p. 380.
 Lebrun, Communauté, p. 61, No. 10, p. 64, ch. 5, Nos. 17-22,
 Renusson, Propres, ch. 6, Sect. 8, Nos. 18-19-26-27-28.
 Chopin, liv. 2, T. 1. No. 26.
 Charondas, sur l'Art. 220 de la Coutume.
 LePrêtre, ch. 42, p. 360.
 Duplessis, p. 141.
 Prost de Royer, p. 592.
 Boucheul, des Conventions de succéder, ch. 14, Nos. 29 et 30.
 Delvincourt, vol. 3, p. 82, notes.
 Ferrière, Dict. de Droit vbo. Ameublissement, p. 84.

L'Intimé au contraire soutenait : 1. que l'ameublement ne pouvait avoir lieu que pour les immeubles que le conjoint lui-même apportait à la communauté. 2. que d'ailleurs, dans le cas actuel, les déclarations d'Antoine Mallet, père, en l'inventaire et en l'acte de vente à l'Intimé équipolaient à partage. 3. que les héritiers du côté maternel d'Antoine Mallet, fils, héritaient de la part avenant à ce dernier du chef de sa mère dans le dit immeuble.(1)

La Cour Inférieure à Montréal avait donné gain de cause à l'Intimé par un jugement dont suit copie :

“ La Cour, etc., considérant que par l'effet de l'ameublement au contrat de mariage de feu Antoine Mallet avec Marie Judith Guédry, le bien en question serait tombé en la communauté stipulée au dit contrat, et que leur fils Antoine Mallet aurait hérité de la moitié par la mort de la dite Marie Judith Guédry, sa mère, et que rien ne constate que la moitié indivise, ainsi échue au fils, ait passé au père, par partage de la communauté ou autrement, de ma-

(1) Guyot, Répertoire vbo. Ameublement, p. 370, 2e colonne.

Ferrière, Grand Cout., vol. 3, p. 67, Nos. 22 à 29.

Pothier, Cout. d'Orléans, p. 293, No. 56.

Pothier, Communauté, pp. 630-1, Nos. 311 à 314.

Lacombe, vbo. Ameublement, No. 6.

vbo. Propres (Donation) 13 alia.

vbo. Succession, p. 252, No. 2.

Bourjon, vol. 1, p. 418 de No. 40 à 50.

Ibid—p. 928, No. 56 à 59.

Denizart, Collection de Jurisp. vbo. Ameublement, No. 7.

Renusson, Propres, ch. 6, Sect. 8, p. 320, 2e col. Nos. 26 à 31, Nos. 40-1.

Ibid—p. 319, No. 20.

Lebrun, Communauté, p. 50, L. 1, c. 5, Nos. 17 et 19.

Ibid—Succession, p. 76, Nos. 54 à 59.

Argou, (11 Edit.) vol. 2, p. 112, *in fine*.

Pothier, Communauté, No. 311.

Toullier, vol. 12, No. 344, No. 137.

Delvincourt, vol. 2, p. 484, notes de la page 127.

Duranton, Contrat de Mariage, S. 3, Ameublement Nos. 54-55.

Renusson des Propres, p. 181,

Duranton, vol. 1, 14, No. 188.

Troplong, Contrat de Mariage, No. 614.

Pothier, Communauté 2 pp. 168 et 170.

Lebrun, Communauté, p. 63.

" nière à reprendre la qualité de propre en sa personne ; que
 " d'ailleurs, le dit Antoine Mallet, père, aurait, en l'acte de
 " vente qu'il aurait fait au Défendeur, reconnu n'avoir de
 " prétention qu'à la moitié du bien, et à l'usufruit de l'autre
 " moitié, échue à son fils, par succession de sa mère, ce qui
 " équivaut à partage quant à lui le dit Antoine Mallet, père,
 " pour empêcher la réversion de la totalité qu'il pourrait
 " réclamer, et son option de ne point réclamer un tel droit,
 " mais de vouloir que la moitié du dit bien demeurât en la
 " succession maternelle de son dit fils, et comme tel appartenant
 " aux héritiers des propres ; qu'enfin le Demandeur alléguant
 " que le défunt Antoine Mallet, père, aurait de son vivant
 " fait vente et cession au Défendeur de tous ses droits et
 " prétentions en la dite terre, avec garantie, de laquelle
 " vente, le Demandeur, en sa dite qualité, ne demande ni la
 " nullité ni la rescision, et que par conséquent cette vente
 " est dans toute sa force, comme transmettant au Défendeur
 " tous les droits et prétentions de feu Antoine Mallet, père,
 " que les dits mineurs représentent comme ses légataires
 " universels—a déclaré et déclare la présente demande mal
 " fondée, et en déboute le Demandeur avec dépens."

La Cour d'Appel, à l'unanimité, a infirmé ce jugement,
 en accueillant et maintenant les conclusions de l'Appelant.

PANET, Juge :—Les faits qui ont donné lieu à la contesta-
 tion en cette cause, sont les suivants :

Les mineurs Boivin, assistés de leur tuteur en cette cause,
 représentent le nommé Antoine Mallet leur ayeul. Cet
 Antoine Mallet, en 1792, épousait Marie Judith Guédry,
 et en faveur de ce mariage Joseph Mallet, père du futur
 époux, s'engageait de donner, et peu de temps après
 donnait une terre, laquelle, dit le contrat, *entrera en la dite*
future communauté. Quelques années après (1794,) la
 femme mourut, laissant pour héritier son fils Antoine Mallet,

auquel son père fut nommé tuteur. Il fit procéder à un inventaire. Dans l'inventaire il fut fait mention de la dite terre dont il (y est-il dit), était en la personne du père survivant, propre de la succession de sa mère. Le dit Antoine Mallet, fils, revêtu de la propriété de l'autre moitié indivise, décéda le 1er Septembre, 1839, *ab intestat*, et sans enfant. En octobre de la même année, Antoine Mallet, père, dont l'héritage propre avait été ameuibli et qui succédait à son fils, vendit à Henry Headley, l'Intimé, tous ses droits, parts et portions dans la terre en question, consistant, y est-il dit, en cinq dixièmes et demi indivis, plus en l'usufruit, la vie durant de lui dit vendeur, des quatre dixièmes et demi restant, et il fut reconnu que les cinq dixièmes et demi appartenaient au vendeur comme suit, savoir : quatre dixièmes et demi d'iceux, en vertu de la communauté entre lui et feu Marie Judith Guédry, en laquelle communauté la dite terre était tombée par une clause d'ameublissement au contrat de mariage, et l'autre dixième comme lui étant échu par la succession de sa mère ; et que quant à l'usufruit des quatre dixièmes et demi restant, il appartenait au dit vendeur comme héritier du dit Antoine Mallet, son fils.

De ces faits surgissent deux questions : la première est de savoir, si, par notre droit coutumier, l'héritage propre, étant ameuibli pour entrer en la communauté, conserve ou reprend sa qualité de propre, lorsque l'enfant, né de ce mariage et héritier de celui des conjoints en faveur duquel l'ameublissement a été stipulé, meurt lui même sans enfants ?

La seconde question est de savoir si, en supposant la première question résolue dans l'affirmative, c'est-à-dire, que le conjoint qui a ameuibli succède à son fils, dans la portion du bien ameuibli dont il avait hérité du chef de l'autre conjoint lorsque ce fils meurt sans enfants, la seconde question, disons-nous, est de savoir si la vente qu'Antoine Mallet, père, a faite à l'Intimé de tous ses droits dans la terre en question,

le rend, aux termes du contrat de vente, garant, au point que les Appelants, qui le représentent, ne puissent avoir et maintenir leur présente action contre l'Intimé ?

La première question trouve une solution facile dans les principes qui régissent les clauses d'ameublement dans les contrats de mariage faits sous le régime de la communauté. Cette clause est une fiction, qui ne passe pas d'un cas à un autre ou d'une personne à une autre. L'ameublement est fait pour faire entrer en la communauté un héritage lequel, sans cela, n'y entrerait pas. Alors, il est censé conquêt pour les fins de la communauté et pour l'intérêt de celui en faveur duquel l'ameublement a été fait. C'est sur ce principe que l'arrêt du mois d'août, 1688, rapporté au Journal du Palais, a décidé qu'une femme avait droit à l'usufruit d'un propre ameubli par son mari, et qu'il retournait dans la succession de son fils décédé sans enfant, parceque pour elle et quant à elle, c'était en vertu de son contrat un conquêt, dont elle avait droit à l'usufruit. Je reviendrai sur cet arrêt.

Dans l'espèce dont nous nous occupons maintenant, le propre paternel ameubli devient conquêt de la communauté, et le fils commun, héritant de sa mère décédée, prend moitié de ce conquêt, et si ce fils fut mort laissant un enfant, cet enfant recueillerait moitié de cet héritage à l'exclusion de la ligne dont le bien provient. Mais la question que nous nous sommes posée est toute autre ; elle est comme en dehors de la communauté, en dehors des intérêts de la femme dans cette communauté, et en faveur de laquelle l'ameublement avait été fait. La convention n'était que pour la communauté, c'était une fiction qui a eu son effet, laquelle est terminée par le décès de l'enfant né de ce mariage et décédé sans enfant. Ce n'est plus maintenant qu'une question de succession. Qui succèdera à l'enfant né de ce mariage et héritier de la moitié de l'héritage en question du

chef de sa mère ? Transmettra-t-il ce bien, originairement propre paternel, aux héritiers collatéraux maternels qui sont étrangers à la ligne d'où le bien procède ? Tous les auteurs que nous avons pu consulter conviennent que la fiction de l'ameublement ne doit durer qu'autant que la communauté existe, et ne doit avoir son effet que vis-à-vis des conjoints. C'est là un axiôme fondamental établi par le célèbre Dumoulin, axiôme que la Cour Inférieure a refusé d'admettre en renvoyant l'action des héritiers du père ; car dans le premier considérant, elle dit : " que rien ne constate que la moitié " indivise, ainsi échue au fils, ait passée au père par partage " de la communauté ou autrement, de manière à reprendre la " qualité de propre en sa personne." Mais indépendamment de ce partage, les choses entières, l'immeuble n'était-il pas possédé par indivis, partie par le père et partie par le fils, ou, si vous voulez, ne se trouvait-il pas en la succession du fils ? Ce considérant veut-il dire, que la seule manière dont un propre ameubli peut reprendre sa qualité de propre, est un partage constatant que l'héritage est demeuré dans la part afférant à celui qui l'a apporté à la communauté ? C'est un des moyens, je l'avoue, par lequel un bien ameubli peut reprendre sa qualité de propre, mais ce n'est pas le seul et certainement ce n'est pas celui invoqué par les Appelants, puisqu'au contraire ils se sont appuyés sur ce que n'ayant point eu de partage, la moitié indivise s'est trouvée dans la succession du fils, décédé sans enfant, et l'autre moitié dans la personne du père, qui avait apporté l'héritage entier en la communauté. La Cour Inférieure a donc supposé un cas que les Demandeurs n'ont point allégué ni prouvé.

Les Demandeurs ont appuyé leurs prétentions d'autorités sans nombre, que l'on trouvera citées dans leurs factums, et qu'il serait trop long de mentionner ici. Ils ont invoqué aussi la jurisprudence des arrêts. Il est à propos de faire

quelques remarques sur trois arrêts qui paraissent avoir spécialement attiré l'attention de la Cour Inférieure : le premier, rapporté par Montholon, est de 1582 ; le second, rapporté dans Soefve, date de 1668, et est par conséquent plus récent de 86 ans ; le troisième, plus récent encore, est de 1688, et est rapporté au Journal du Palais. L'arrêt de 1582, a jugé que " dans le cas d'une communauté de tous biens, le père survivant à son fils, ne prenait pas à titre de réversion les propres qui venaient de lui, mais que la part qui avait appartenu à la mère, en vertu de cette communauté, appartenait aux héritiers maternels." C'est sur cet arrêt, et une observation de Lebrun à son sujet, que la Cour Inférieure paraît s'être appuyée pour renvoyer l'action des Demandeurs, sans remarquer que dans l'espèce de cet arrêt il s'agissait d'une communauté de tous biens ; qu'au contraire, dans l'espèce qui lui était soumise, il ne s'agissait que de l'ameublement d'un héritage particulier. Distinction importante, que Lebrun lui-même admet ; écoutons-le, No. 23 : " Il y a une différence à faire du propre ameubli par le mari ou la femme, donné à un enfant héritier du prédécédé, et de la stipulation faite par contrat de mariage, que les conjoints seront communs en tous leurs propres présents et à venir ; au premier cas le propre retournera pour le tout au survivant des conjoints duquel il vient, et non pour moitié seulement, comme ayant été commun et sujet au partage de la communauté. Au second cas, il n'y retourne que pour moitié, parceque tous les propres ont été acquis aux conjoints chacun pour moitié *jure societatis*. Saligny concilie par cette distinction l'arrêt de 1582, rapporté par Montholon, et celui de 1591, rapporté par Chopin." (Voir II. Petit Cout. p. 360.) Comment est-il arrivé que la Cour, en expliquant son jugement, se soit appuyée sur cet arrêt de 1582, lequel, comme l'on a vu, est dans une espèce diffé-

rente? Il est vrai que Lebrun, après avoir cité l'arrêt de 1668, avait observé en mentionnant l'arrêt de 1582, " que " l'on ne suivrait donc pas à présent l'arrêt dans Soefve," savoir, celui de 1668. Il est tout probable qu'il y a ici erreur, car Lebrun, dont l'expression semble favorable à la jurisprudence la plus récente, paraît se contredire, en adoptant l'arrêt le plus ancien. Quelle influence cet arrêt de 1582 avait-il pu avoir sur celui de 1668? Si l'on hésitait à admettre que Lebrun se fut trompé, il faudrait reconnaître qu'il en est venu à une conclusion qui n'est pas digne de ce jurisconsulte. Après tout, cette erreur peut n'être pas la sienne ; elle peut être due à l'incurie des avocats au parlement qui ne nous ont point favorisés de leurs noms, mais qui, enchaînant sur Maître Louis Hideux, leur devancier, avouent avoir augmenté considérablement le traité posthume de Mr. Lebrun, où cette erreur s'est glissée. Les arrêts de 1668 et 1688, déjà mentionnés, consacrent l'un et l'autre la doctrine déjà établie, savoir, qu'en matière de stipulation de propre ameubli, cette stipulation ne doit avoir lieu qu'entre les personnes qui contractent, savoir, le mari et la femme, suivant la remarque de Dumoulin. La Cour, regardant les deux arrêts comme contraires, se demandait s'il fallait suivre l'arrêt de Soefve ou celui de 1668? La réponse était facile, c'est que la doctrine de l'un et de l'autre étant la même, la Cour aurait dû la suivre de préférence à l'arrêt de 1582, rendu dans une espèce différente de celle alors à juger. Renusson, après avoir rapporté l'arrêt de 1668, cite celui de 1688, non comme contraire à la doctrine du premier, mais à l'appui de son opinion qu'il exprime ainsi :

" Le second effet de la communauté est, que si tous les " enfants issus du mariage viennent à décéder, le père " jouira par usufruit de l'héritage de sa femme, qui avait été " fait conquêt de la communauté, et qui était échü à ses " enfants par le décès de leur mère, suivant les articles 230

“ et §14 de la Coutume de Paris, qui donne au père, survivant ses enfants, l’usufruit de la moitié des conquêts de la communauté, qui était échue aux dits enfants comme héritiers de leur mère, la convention ayant été faite pour la communauté et pour l’intérêt de l’un et de l’autre des conjoints, et il lui faut donner tous les effets de la communauté ; l’héritage propre ameubli est entré en la communauté, il est par conséquent réputé conquêt fait par le mari, et doit être considéré comme les autres conquêts pour tout ce qui concerne l’intérêt du mari dans la communauté.” Renusson finit par ajouter : “ Par arrêt du 7 janvier, 1688, rapporté au Journal du Palais, il a été jugé que propres ameublés sont réputés conquêts pour l’usufruit des ascendants :” et il ajoute aussitôt, “ reste à observer, que l’héritage ameubli ou réputé conquêt, conserve sa qualité de propre quand il ne s’agit plus de l’intérêt des conjoints touchant la communauté.” C’est donc à tort que l’on a cru que cet arrêt de 1688, était contraire à celui de 1668. Tous deux sont conformes aux principes qui règlent l’étendue de la fiction d’un ameublement.

La seconde question, avons-nous dit, est de savoir si la vente que Mallet, père, a consentie à l’Intimé, de tous ses droits dans cette terre, le rend, aux termes du contrat, garant au point que les Appelants actuels, ses représentants, ne puissent avoir et maintenir leur action au pétitoire contre l’Intimé ? Pour répondre à cette question il ne faut que référer aux termes mêmes du contrat, pour se convaincre que Mallet n’a pas vendu ce qui est réclamé aujourd’hui, savoir, la propriété des quatre dixièmes et demi de la terre dont est question, mais seulement l’usufruit ; l’acte dit qu’il vend tous ses droits, parts et portions dans la susdite terre, mais il ajoute aussitôt “ consistant en cinq dixièmes et demi, plus “ en l’usufruit, la vie durant du dit vendeur, des quatre dixièmes et demi restant.” Comment, avec une telle dé-

signation, l'acheteur pouvait-il comprendre qu'il acquérait la propriété de ces quatre dixièmes et demi dont il ne devait avoir que l'usufruit ? Je ne conçois pas que l'on ait pu s'appuyer sur cet acte de vente, pour dire que " Mallet, père, " aurait reconnu (ce sont les termes du jugement dont est " appel) n'avoir de prétentions qu'à la moitié du bien et à " l'usufruit de l'autre," et ajouter que cela équivalait " à " partage quant à lui le dit Antoine Mallet, père, pour em- " pêcher la réversion de la totalité qu'il pourrait réclamer, " et son option de ne pas réclamer un tel droit, mais de vou- " loir que la moitié du dit bien demeurât en la succession " maternelle de son dit fils, et comme telle appartenant aux " héritiers des propres."

De fait, Antoine Mallet n'a vendu que l'usufruit des quatre dixièmes et demi de la propriété, et l'Intimé n'en a acheté que l'usufruit, et son titre d'acquisition à la main, il n'a aucun droit à la propriété de ces quatre dixièmes et demi. Les Demandeurs ne cherchent pas à l'évincer de ce qu'il a acheté, savoir : la propriété de cinq dixièmes et demi et l'usufruit des quatre dixièmes et demi restant, mais ils demandent la propriété de ces quatre dixièmes et demi, abstraction faite de son droit d'usufruit, dont lui l'Intimé a dû jouir jusqu'à la mort de son vendeur. L'Intimé n'aurait donc pas eu droit d'opposer l'exception de garantie, car Mallet ne lui avait pas garanti ce qu'il ne lui avait pas vendu. Les Demandeurs, par la même raison, pouvaient maintenir leur action sans être tenus de faire rescinder la vente.

Voici la teneur du jugement :

" La Cour, &c., considérant que par le Droit Coutumier
 " du Pays, la clause d'ameublissement d'un propre n'est
 " qu'une fiction, qui ne doit durer qu'autant que la commu-
 " nauté existe, et ne doit avoir effet que vis-à-vis des conjoints

" et pour l'intérêt de la communauté ; que cette fiction
 " cesse et n'a plus d'effet dans les successions à l'égard des
 " étrangers et héritiers collatéraux. Considérant que le
 " nommé Léon Charlebois, tuteur des mineurs Boivin,
 " l'Appelant en cette cause, a allégué et prouvé que les dits
 " mineurs représentent feu le nommé Antoine Mallet qui, en
 " l'année 1792, épousa Marie Judith Guédry, en faveur
 " duquel mariage Joseph Mallet, père de l'époux, donna la
 " terre ci-après désignée, savoir : une terre sise et située &c.,
 " laquelle terre, dit le contrat de mariage des parties, entrera
 " en la dite future communauté. Que la dite M. J. Guédry
 " est décédée ensuite laissant pour son seul et unique
 " héritier son fils Antoine Mallet, lequel est lui-même
 " subséquemment décédé sans enfant, et avant partage de
 " la communauté qui avait eu lieu entre ses père et mère,
 " qu'alors la fiction d'ameublissement étant terminée, les
 " parents les plus proches de la ligne paternelle ont dû
 " hériter du dit Antoine Mallet, fils, à l'exclusion des héri-
 " tiers collatéraux maternels en la propriété de la part et
 " portion dans l'immeuble sus-désigné, dont le dit Antoine
 " Mallet, fils, amendait du chef de sa mère dans la dite com-
 " munauté, le dit immeuble étant un propre de la ligne
 " paternelle qui avait été ameubli comme susdit, seulement
 " pour les fins de la communauté ; considérant de plus que
 " le dit Antoine Mallet, en vendant à l'Intimé tous ses droits,
 " parts et portions dans la terre en question, consistant, est-il
 " dit au contrat de vente, en cinq dixièmes et demi indivis,
 " plus en l'usufruit la vie durant du vendeur des autres
 " quatre dixièmes et demi restant, n'a pas aliéné la propriété
 " de ces quatre dixièmes et demi dont il ne cédait que l'usu-
 " fruit ; considérant enfin, que dans le jugement de la Cour
 " Inférieure, en date du 31 janvier, 1848, dont est appel, il
 " y a erreur en ce que la dite Cour n'a point eu égard aux
 " principes ci-dessus, et a débouté l'Appelant, ès qualité,
 " de son action pétitoire dirigée contre l'Intimé, injuste pos-

“ sesseur de la propriété des dits quatre dixièmes et demi de
 “ la dite terre : la présente Cour du Banc de la Reine,
 “ renverse et met au néant le jugement de la Cour Inférieure,
 “ &c., et procède à rendre le jugement que la dite Cour
 “ Inférieure aurait dû prononcer. La présente Cour déboute
 “ le dit Henry Headley de son exception péremptoire en
 “ droit perpétuelle, comme mal fondée en droit et en fait, et
 “ faisant droit au fonds, déclare et adjuge le dit Léon Char-
 “ lebois, ès qualité, tuteur des dits mineurs Boivin, Appelant,
 “ le vrai et légitime propriétaire de quatre dixièmes et demi
 “ de la terre sus-désignée, &c. ; en conséquence, le dit Henry
 “ Headley, condamné à en quitter et abandonner la jouis-
 “ sance et possession, et à les rendre et restituer à l'Appelant
 “ avec fruits et revenus, &c.”

LAFONTAINE et BERTHELOT, pour l'Appelant.

JOHNSON F. G., pour l'Intimé.

BANC DE LA REINE, } DISTRICT DE MONTREAL.
 EN APPEL.

Présents : ROLLAND, PANET et AYLWIN, Juges.

DEASE.....*Appelant*,
 et

TAYLOR.....*Intimé*,

Jugé, qu'il y a lieu d'appeler d'un
 ordre de la Cour Inférieure (la Cour
 Supérieure) radiant une Inscription pour
 audition au mérite en vacance, sur une
 exception à la forme, en l'absence d'un
 consentement par écrit des parties pour
 telle audition hors du terme.

Held, that an appeal lies from an order of the Inferior Cour (the Superior Court) discharging an Inscription for hearing in vacation, on the merits of an *exception à la forme*, without the consent in writing of the parties for such hearing out of term.

Jugement rendu le 12 mars, 1852.

Le Défendeur en Cour Inférieure opposa à la demande du
 Demandeur une exception à la forme, sur laquelle ce dernier

lia contestation. L'enquête terminée, le Demandeur inscrivit la cause sur le rôle pour audition sur le mérite de l'exception à la forme, le 3 février, 1852, aux séances hebdomadaires de la Cour Supérieure à Montréal, et le Défendeur déclara sur l'inscription en avoir été dûment notifié.

Les parties furent entendues le jour fixé, et la cause prise en délibéré.

Le 10 février, la Cour Supérieure, composée de SMITH et MONDELET, Juges, rendirent le jugement qui suit : " The Court having heard the parties by their Counsel upon the merits of the *exception à la forme*, pleaded by the said Defendant, to the action and demand of the said Plaintiff, and having examined the proceedings and deliberated, considering that there is not of record a consent in writing of the parties in this cause, that the merits of the said Exception be heard and determined upon by this Court in its weekly sessions, and that without such consent, this Court has no jurisdiction to hear or determine upon the merits of the said Exception, doth discharge this cause from the *Rôle de Droit*, upon which it had been inscribed for hearing on the merits of the said Exception."

Le Demandeur obtint en Cour d'Appel une règle contre le Défendeur, pour montrer cause pourquoi il ne serait pas accordé un appel de ce jugement de la Cour Supérieure ; la règle fut contestée, et le douze mars dernier la majorité de la Cour accorda l'Appel.

ROLLAND, Juge, (*dissentiente*) :—D'après l'Ordonnance de 1785, le Demandeur en cette cause a-t-il droit à un appel ? Il s'agit d'un jugement qui met de côté l'Inscription pour audition en vacance dans une cause contestée par Exception à la forme.

Il y a dans l'Ordonnance trois cas où l'appel peut être accordé d'un jugement interlocutoire portant exécution, en

ordonnant de faire ou d'exécuter quelque chose à laquelle il ne peut être remédié par le jugement final, ou par laquelle le droit de la matière en contestation entre les parties puisse être en partie décidée, ou par laquelle le jugement final puisse être retardé sans nécessité. Ce n'est ici évidemment ni le premier ni le second cas ; mais voyons si on peut invoquer le dernier. Depuis longtemps on a interprété que cette disposition n'était applicable que dans le cas où la cause ayant été plaidée au mérite, le juge ordonne une enquête ou une visite d'Experts, ou quelqu'autre procédure de ce genre, et non pas un ordre qui se réduit à un ajournement d'une audience à l'autre. On va voir pourquoi on l'a ainsi ordonné en France. Autrefois, on donnait l'appel sur tous les incidents du procès sur l'enquête, sur les reproches de témoins. Les lois de Pluviose et de Brumaire restreignirent ces appels, et ce que le code a réglé n'est rien autre chose que l'essence du Droit Français bien entendu. Carré Pro. Civ. nous dit ce que c'est qu'un jugement interlocutoire dont il puisse y avoir appel, et pour appuyer sa doctrine il nous réfère au Droit Romain. A la page 279, il dit : " le jugement interlocutoire dont il peut y avoir appel est ce jugement qui est *irréparable en définitive*." Si on recourt à l'art. du code de procédure civile l'on voit qu'il n'y a pas d'appel des jugements préparatoires, mais seulement des jugements interlocutoires qui préjugent le fonds. La loi veille à ce qu'il n'y ait pas d'appel prématuré ; c'est pourquoi il n'y a pas d'appel d'un jugement qui retarde l'audition de huit jours. Le jugement dont il s'agit ici préjuge-t-il le fonds ? non ; donc il ne peut y avoir d'appel. Mais nous dira-t-on, c'est un jugement qui règle un grand point. Trouve-t-on dans l'Ordonnance que c'est là une raison pour accorder l'appel sous le prétexte que c'est une question d'un grand intérêt, et faudra-t-il que la Cour accorde des appels *pro bono publico* ? Il suffira alors que les parties s'entendent pour soumettre toutes sortes de questions et obtenir ainsi l'opinion de la Cour ; quant à moi, je ne

puis sanctionner un pareil système, et je suis dans la nécessité de différer d'avec mes savants confrères sur la demande maintenant devant la Cour.

PANET, Juge :—Les autorités citées par l'Honorable Juge **ROLLAND**, ne sont pas applicables ici, et n'ont pas force en ce pays. Elles sont peut-être plus sages que les dispositions qui nous régissent, et l'Honorable Juge, pour cela, a sans doute raison d'insister. Mais nous avons une loi du pays à interpréter, et nous ne devons pas nous en écarter.

Il y est dit que tout ce qui retardera sans nécessité le jugement final sera susceptible d'appel. Le jugement en question renferme un grand point qu'il est intéressant de voir résoudre, et il paraît retarder inutilement le jugement final de la cause, car si l'exception est maintenue, le Demandeur débouté, pourra plus vite commencer une nouvelle poursuite, et si au contraire l'exception eût été renvoyée, le Demandeur aurait pu procéder au mérite et obtenir un jugement sur le fonds bien plus tôt. Ce jugement ne tombe, il est vrai, dans aucune des catégories des autorités tirées du Code, mais s'il y a des abus, la législature ne manquera pas d'y apporter remède.

AYLWIN, Juge :—Le jugement est dans les termes et l'esprit de la loi. Le Demandeur est retardé dans l'obtention du jugement final, il a droit à faire réviser ce jugement. La Cour n'a pas à s'occuper si la Cour avait droit de refuser de rendre jugement, mais c'est une question importante et qui demande une décision définitive.

La motion est accordée.

GUGY, pour l'Appelant.

BADGLEY et **ABBOTT**, pour l'Intimé.

SUPERIOR COURT.—MONTREAL.

Before DAY, VANFELSON and MONDELET, Justices.

No. 2179. { TORRANCE ET AL., *Plaintiffs*.
 { vs.
 { GILMOUR ET AL., *Defendants*.

Held, that the liability of the bail to the Sheriff on a Writ of *Cap. ad Resp.* is for the amount endorsed on the Writ, and no more : That where the Sheriff has taken bail for double the amount of the debt sworn to in the affidavit, and the Plaintiff has afterwards obtained a judgment for a larger amount, the liability of the bail cannot be extended beyond the amount sworn to in the affidavit, and endorsed on the Writ of *Cap. ad Resp.* : That an assignment by the joint Sheriff under their customary signature, and in the form used in England, is a good assignment : That a motion by the Defendant to be permitted to put in special bail for the amount sworn to and endorsed on the Writ, which motion was rejected, is not a sufficient compliance with the Writ, so as to relieve the bail to the Sheriff.

Jugé, que l'obligation contractée en vertu d'un cautionnement donné au Shérif sur un *Cap. ad Resp.*, est pour le montant porté au dos du Bref, et pas davantage : Que dans l'espèce où le Shérif a pris le cautionnement pour le double du montant mentionné en l'affidavit, et que le Demandeur a obtenu jugement pour une plus forte somme, l'obligation de la caution ne peut excéder le montant mentionné dans l'affidavit et endossé sur le Writ de *Capias* : Que le transport par des Shérifs conjoints sous leur signature ordinaire, et dans la forme usitée en Angleterre, est valable : Qu'une motion faite par le Défendeur à l'effet qu'il lui soit permis de donner un cautionnement spécial pour le montant mentionné en l'affidavit, et porté sur le Writ, laquelle a été rejetée, n'est pas une exécution suffisante des exigences du Writ, pour libérer les cautions envers le Shérif.

Judgment the 9th December, 1851.

Action on Bail-Bond against the Sureties.

The declaration alleged the arrest of one J. S. under a *cap. ad. resp.*, issued at the suit of the Plaintiffs for £137 10s., the sum endorsed on the Writ ; his indebtedness in the sum of £237 10s. ; that the Defendants became Bail to the Sheriff for his appearance on the return of the Writ ; the neglect of J. S. to appear on the return day, and the rendering of a judgment against him for £237 10s. ; to wit, £137 10s., amount of a certain draft, and £100, for monies had and re-

ceived by him as Agent of the Plaintiffs ; also, the assignment of the Bail-bond by the Sheriff to the Plaintiffs ; and concluded for the sum of £275, being less than the amount of the Plaintiffs' debt, interest and costs in the said suit.

The condition of the Bail-bond, which was for £275, double the amount of the debt sworn to, was " that if the above bounden J. S. does appear before the Queen, in Her Court of Queen's Bench at Montreal, on monday, the second day of October next, at ten of the clock in the forenoon, to answer the Plaintiffs in a plea as contained in a certain declaration to be annexed to a Writ of *ca. ad. resp.* issued, &c. &c. for the sum of £137 10s., then this obligation to be void and of no force, otherwise to stand and remain in full force, vigor and effect."

The assignment, which was endorsed on the back of the Bail-bond, was as follows : " Know all men, &c., that we, John Boston and William Foster Coffin, Esquires, Sheriff of the District of Montreal, in the Province of Canada, within named, have, at the request of A. and B., the Plaintiffs, also within named, assigned to them the said A. and B., the said Plaintiffs, the within Bail-bond, pursuant to the Statute in such case made and provided. In witness whereof, we have hereunto set our hand and Seal of Office, at the City of Montreal, the 16th day of the month of August, in the year of Our Lord, 1849.

BOSTON & COFFIN, Sheriff.

We accept the foregoing assignment and transfer.

A. and B.

Signed, sealed and delivered,
&c. &c. &c.

The Defendants set up by way of exception : 1. That on the return day of the Writ, J. S. appeared by his Attorneys, and offered to give special bail for £137 10s., sworn to in the affidavit, which motion was illegally rejected by the Court, and that the Defendants were therefore discharged from all liability upon the Bail-bond. 2. That the assignment of the Bail-bond was informal. 3. That the judgment in the cause against J. S. was for a sum different from that set forth in the affidavit to hold to bail, and that the Defendants could not be held liable to pay any sum greater than that sworn to in the affidavit and endorsed on the Writ.

The Plaintiffs demurred to these pleas. Issue being joined, the question of law was reserved to the final hearing.

The proceedings in the original suit were filed, and admissions given of the other material facts alleged in the declaration.

The only witnesses called by the Defendants were James Law, Esquire, merchant, and A. Robertson, Esquire, advocate.

The last named witness stated, that he received instructions from J. S. to apply to the Defendants to enter special bail, and that he accordingly did so ; and that the names of the persons given to him as special bail, were James Gilmour, one of the Defendants, and James Law : that he accordingly prepared a motion, of which a copy was filed in the present cause, and to the best of his recollection the said James Gilmour and James Law were both present personally in Court on the day he made the motion, and went away on the motion being taken *en délibéré*. The motion was subsequently rejected.

Cross, for Plaintiffs : It is too late for the Defendants to seek to avail themselves of informalities in the original suit

which the Plaintiffs might have answered at the time. J. S's. appearance would have been a good plea, if it were shewn on the record, which it is not. The mere motion to be permitted to appear, amounts to nothing: besides, that motion was rejected, for what reason it does not appear—it may have been for want of notice or the inobservance of some formality; nothing but the special Bail-bond, or the surrender of the debtor, can be considered sufficient evidence of compliance with the Writ. The assignment of the Bail-bond is in the form used in the Courts in England, and if no Provincial Statute exists authorizing an assignment, the mention of the word "Statute" does not vitiate the instrument. As to the liability of the Defendants to pay the entire sum for which judgment was rendered, the object of the Statute 5 Geo. IV. cap. 2, is to have the Defendant or his bail: the words are, "that the bail shall not become liable unless the Defendant shall leave this Province without having paid the debt, interest and costs, for which the action shall have been brought:" here the "debt" is the amount for which judgment has been recovered, and the Defendant not having surrendered, that is the amount for which the bail must be held liable. Such is the rule in England. The Sheriff has received the bond as a Trustee for the Plaintiffs, and it stands good for the Plaintiffs' indemnity to the full amount of their debt, and the Sheriff would have been liable for that amount in case of an escape.

ROSE, for Defendants: The assignment of the Bail-bond is null and void, and confers no right on the Plaintiffs. It should have been signed and sealed by both Sheriffs, and should have contained a formal subrogation. The words "have assigned the within Bail-bond" seem to refer to some separate instrument, and amount to no more than a certificate that an assignment had been previously made, the terms of which do not appear: as none is shewn, it is to be inferred from

the language, that the assignment, if it ever existed, was separate from this certificate. The Defendant J. S. did appear, and moved to put in bail for the amount sworn to, which is all that the Statute requires, and the utmost his sureties are bound for. This is shewn by the Plaintiffs' own proceedings. The Defendants therefore have complied with the conditions of their bond and are relieved, notwithstanding that the motion was wrongfully rejected by the Court. Under any circumstance, they cannot be held liable for more than the amount sworn to in the affidavit, and on payment of which J. S. would have been released at the time of his arrest.

DAY, Justice :—This is an action on a Bail-bond taken by the Sheriff on a Writ of Capias issued against J. S. The amount endorsed on the bail-bond is £137 10s.. J. S. was arrested and the Sheriff took bail in the usual terms for double the amount of the debt, on the condition, that J. S. would appear on the return day to answer the action. When the action was returned, J. S. appeared by his Attorneys, and made a motion for leave to put in special bail, not in the terms of the Statute, but for the amount endorsed on the writ. This motion, in this restricted form, was rejected, and in fact no special bail was put in. The case then proceeded by default, and the Plaintiffs obtained judgment for £237 10s. and on that judgment have brought the present action, the Bail-bond having been assigned. The points raised by the pleas are : 1. That the assignment of the Bail-bond is not sufficient in point of form : 2. That there is no evidence of default of the debtor in the original action : 3. That the Plaintiffs can only recover the amount endorsed on the writ. On the first point, the Court holds that the assignment, which is in the usual form, is sufficient. Under our system no set form of words or special mode of proceeding is necessary ; it is enough that the instrument, signed by both parties,

shews plainly what was the intention of the parties in executing it. On the second point, we are of opinion that the special bail should have been offered in the terms of the Statute. The condition of the Bail-bond is that J. S. should appear, and not doing so, his bail become liable. There is no evidence of the Defendant's appearance in the original action apart from the motion to put in bail, and in the absence of the reasons for the rejection of that motion, we have the substantial fact that no special bail was put in. With respect to the third point, the Court is with the Defendants. Nothing but a course of reasoning founded on fictions can lead to the conclusion that a person arrested for £137 10s., and who, by paying that sum, can obtain his release, can bind his bail for two or three times, or it might be ten times that amount. There is no analogy between our system and the system which prevails in England in this respect. We entertain no doubt that the liability of the bail is for the amount endorsed on the writ, and no more. The Defendant in the original suit could have got free by paying £137 10s., and the irresistible conclusion is that the bail cannot be held liable for a greater amount.

The following is the judgment :

“ Considering that the Plaintiffs have proved the material allegations of their declaration, and that by reason thereof, and by law, they are entitled to recover from the Defendants the sum of £137 10s., current money of the Province of Canada, that is to say, the amount specified and endorsed upon the writ of *Capias ad respondendum* issued in the cause wherein the said Plaintiffs were Plaintiffs, and J. S., in the said declaration mentioned, was Defendant, with the interest on the said sum, and costs adjudged and taxed in the said suit, and no more ; and considering that the Plaintiffs ought not, by reason of any thing contained in the exceptions of the Defendants, or either of them, in this cause filed, or by them established, to be prevented from recovering the said sums of

money, dismissing the said exceptions, doth adjudge and condemn the Defendants, jointly and severally, to pay to the Plaintiffs the sum of £161 11s. [being the £137 10s., with interest and costs in the previous action] for the payment of which the said Defendants, by reason of the Bail-bond in the said declaration set forth, executed by the Defendants to and in favor of the Sheriff of this District, on the 27th July, 1848, and duly assigned to the Plaintiffs, and of the proceedings in the said cause had and taken, and by law, became and are liable to pay to the Plaintiffs, the whole with interest and costs.

CROSS and TORRANCE, for Plaintiffs.

ROSE and MONK, for Defendants.

The following are the authorities cited by the Plaintiffs' Counsel as to the extent of the liability of the Sheriff's Bail :

3 T. R. p. 28, *Stevenson v. Cameron* :—7 T. R. p. 370 :—1 H. B. Rep. p. 233 and p. 76 :—3 East, p. 604 :—3 Petersd. Abridgt. p. 96, v. Bail :—Impey's Office of Sheriff, p. 100 :—Statute 5 Geo. 4, c. 2, s. 1, p. 135, Rev. Statutes :—12 Vict. c. 42, sec. 13 and 14 :—Watson's Office of Sheriff, p. 369 :—Chitty's Prac. vol. 3, p. 828.

No. 2399 } MACFARLANE,.....*Plaintiff.*
of }
1852. } BRESLER.....*Defendant.*
vs.

Held, that in the absence of the return to a *Com. Rog.* issued at the instance of the Plaintiff, a Defendant cannot be compelled to proceed with his *Enquête*.

Le Défendeur ne peut être contraint de procéder à son Enquête avant le Rapport d'une Commission Rogatoire émanée sur la demande du Demandeur.

In this case, a *Commission Rogatoire* had been ordered, on motion of the Plaintiff, to examine certain witnesses in the State of New-York, the Defendant refused to join in the Commission. The Plaintiff closed his *Enquête*, reserving to himself the right to file the return to this Commission thereafter, and required the Defendant to proceed with his *Enquête*, and on his failing to do so had him foreclosed.

The Defendant moved for a revision of this order, on the ground that in the absence of the return to the *Com. Rog.* he had had no opportunity of seeing or becoming acquainted with part of the evidence of the Plaintiff, and was ignorant what evidence it might be necessary for him to adduce in contradiction of such evidence of the Plaintiff.

DAY, Justice :—A practice has prevailed to this effect. As the question, however, now comes up, we are prepared to say that such a practice cannot be supported. It is contrary to common sense that when a *Commission Rogatoire* has not been returned, and the Defendant consequently cannot know what evidence he has to meet, he shall be forced on

with his *Enquête*. We are, therefore, of opinion that the ruling at the *Enquête* was wrong, and the order must be reversed.

Motion granted without costs.

BETHUNE and DUNKIN, for Plaintiff.

BIDWELL and KERR, for Defendant.

SUPERIOR COURT.—MONTREAL.

Before DAY, SMITH and MONDELET, Justices.

No. 652	}	LA BANQUE DU PEUPLE.....Plaintiff.
of	}	vs.
1852.	}	ROY et AL.....Defendants.

Held, That in the absence of any restraining power in the rules of practice, or of any order, confining *Enquête* days in term to cases *Ex parte*, the Court has no power to prevent a party from proceeding with a contested case during the *Enquête* days in term.

Jugé, Qu'en l'absence de dispositions restrictives dans les règles de pratique, ou d'ordre quelconque, restreignant les jours d'*Enquête* pendant le terme aux causes *Ex parte*, la Cour n'a pas le pouvoir d'empêcher une partie de procéder à instruire une cause contestée pendant les jours d'*enquête* durant le terme.

Judgment rendered 17th April, 1852.

In this case, the Plaintiff had served notice on the Defendants to proceed with their *Enquête*, on one of the two days fixed for *Enquêtes* in term, the *Enquête* being on an *Exception à la forme* filed by the Defendants. The Defendants refused to proceed, contending that by the practice of the Court for a long series of years, and by law, *Enquête* days, during term, were restricted to non-contested or *Ex parte* cases. The presiding judge (MONDELET) having heard the

parties, ordered the Defendants to proceed, unless a special application, founded on affidavit, were made within half an hour. No such application having been made, the Defendants were foreclosed.

The Defendants moved for a revision of this order.

STUART, H. in support of the motion.

The practice for a long series of years, which has restricted *Enquêtes* in term to non-contested cases, ought to govern in the absence of any precise law altering that practice. The new rule of practice (1) does not say that contested cases shall be inscribed for *Enquête* in term, but only that the notice shall be shorter in term than in vacation. Nor is the law more restricted now than before. The only difference arises out of the alteration in the rule of practice, which has been framed to meet the different practice existing in the Districts of Montreal and Quebec, and without any intention of changing the practice prevailing in this District. In Quebec, it has always been the practice to proceed to *Enquête* with contested cases in term, but in this District it was otherwise, and great inconvenience would result, if the pretensions of the Plaintiff were to prevail. As regards Circuit Court cases, the rule for which we contend has been observed, though the law is precisely the same.

MONDELET, Justice :—That is, because it is impossible for us to perform both duties, and we must first discharge those of our own Court.

STUART : If the law is imperative in the one case, it is equally imperative in the other. Mondays and Tuesdays are as much *Enquête* days by the Judicature Act as any other days, and yet the Court has decided it will not compel a party to pro-

(1) Chap. IX, sec. 41, p. 13,

ceed to *Enquête* on those days. (1) Thus the Court has put a construction on the law favorable to the pretensions of the Defendants, and the practice of fifty years ought fairly to be invoked against the judgment rendered at *Enquête*.

DORION *contrà*. The Act 7 Vict c. 16, leaves it to the judges to fix the *Enquêtes* as well in term as in vacation, and by the rule of practice they did so : but the present Judicature Act gives the Court no such discretion. The Court has no power to limit the days fixed by the Statute, and the days the law gives the Court power to appoint, are of the same kind as the other *Enquête* days, without any distinction as to cases *Ex parte* and contested.

DAY, Justice :—If we have the power to appoint the days, may we not restrict them ? The difficulty is, that we have not done so.

DORION, The delay for proceeding to *Enquête* in contested cases is fixed by the Judicature Act at one day, but the rule of practice, sec. 51, prescribes two days' notice in term for contested cases, thus showing plainly the intention to proceed with contested cases during term, as the law, in fact, requires.

DAY, Justice :—This question comes upon a motion to revise a judgment rendered at *Enquête*, and the position taken is as to the naked right of a party, under the Statute, to compel his adversary to proceed to *Enquête* in a contested case during term. The Statute 7 Vict. c. 16, left it to the judges to appoint the days for taking *Enquêtes*, as well in term as in vacation, according to their discretion. By the present Judicature Act, all days out of term, with certain exceptions, are *Enquête* days, and such days in term as the Court shall have appointed for that purpose. Under the old law, the inconvenience of having *Enquêtes* in term for con-

(1) 1 L. Canada Reports, p. 475, *Quesnel vs. Donegani*.

tested cases having been felt, a special rule of practice was adopted, restricting *Enquêtes* in term to cases by default and *Ex parte*. At the time of making the new rules of practice, the propriety of re-enacting this rule was discussed, and the result was that it was omitted. In the absence, therefore, of any restraining power in the present rules of practice or of any order, to confine *Enquête* days in term to cases *Ex parte*, we must go to the Statute itself. Now the Statute makes no distinction. It follows, therefore, that the Court has no power to prevent a party, who insists on urging on a contested case during term time, from doing so. The Court feels all the inconvenience of such a practice, but when the question is put on the naked right, we must deal with it according to law. As to the surprise which has been complained of, there could be none, legally speaking. The restriction which formerly existed was not founded, as was argued, on general usage, but on special legislation, on a rule of practice of the Court. When that rule was rescinded, that was notice to the bar that the practice was changed. The reason of omitting the rule was to give the Statute its direct operation. But the Court, as I have said, feel all the inconvenience of the practice, and purposes taking on itself the responsibility of restricting *Enquêtes* during term to non-contested cases. If our right to do this should be challenged, (and we shall be glad if it is) we shall then have an opportunity of hearing parties on the point and testing the question.

MONDELET, Justice, agreed with the remarks of his learned brother on the motion submitted, but would reserve his opinion as to the right of the Court to restrict the *Enquête* days, until the question came up before them.

SMITH, Justice, dissented from the judgment, considering that the practice of the Court for a long series of years should control the Statute when the sense seemed doubtful.

The following is the judgment.

"The Court having heard the parties &c., considering that the 13th and 14th of this present term of April were *Enquête* days appointed by this Court for taking evidence in cases therein pending, and that no rule of practice or order of the Court subsists or then subsisted, whereby parties are or were restrained from proceeding to *Enquête* on the said days, in contested cases pending before this Court, doth reject the said motion with costs."

CHEBRIER and DORION, for Plaintiff.

H. STUART, for Defendants.

COUR SUPERIEURE.—TROIS-RIVIERES.

Présents : MONDELET, VANFELSON et MEREDITH, Juges.

No. 261 { BANQUE DU PEUPLE,.....*Demandeurs*,
de { VS
1852. { GINGRAS.....*Défendeur*.

L'on ne présume jamais que le tiers | The *Tiers détenteur* is never pre-
détenteur s'oblige personnellement. | sumed to bind himself personally.

Jugement le 24 Février, 1852.

La demande est pour £220 16 10, montant d'une obligation consentie par le nommé Modeste Richer au nommé Pierre Eustache Dostaler, et transportée par ce dernier à la Banque du Peuple. L'obligation contient une hypothèque spéciale sur une propriété dont le Défendeur a fait l'acquisition par partie.

DUMOULIN, pour les Demandeurs, sollicite une condamnation personnelle contre le Défendeur, s'appuyant sur les faits dont il sera fait mention dans les motifs de la décision.

TURCOTTE, C. R. pour le Défendeur, qui a répondu par une défense au fonds en droit, prétend que l'action devrait prendre la forme hypothécaire. (1)

MONDELET, Juge :—La déclaration allègue, entre autres choses, que par offres et protêt du 15 novembre, 1850, le Défendeur a fait offre de payer la créance de la Banque, *comme étant le détenteur et propriétaire* d'une partie des biens hypothéqués. Que par Acte en date du 12 avril, 1851, la Banque a signifié au Défendeur sa créance et son droit d'hypothèque, lui déclarant que comme *Détenteur* de la propriété hypothéquée, il a, *pour se libérer de son hypothèque*, fait les offres ci-dessus, que la Banque a alors refusées : que maintenant la dite Banque est prête à accepter ces offres, et requiert le Défendeur de payer sous vingt-quatre heures, à quoi le Défendeur a répondu qu'il persistait dans ses offres. Que par lettre missive, datée à Yamachiche, le 21 mai, 1851, le Défendeur a *renouvelé* sa promesse de payer à la Banque, le montant de l'obligation en question, &c. ; et a de fait payé une partie de la somme due, "et qu'il redoit à la Banque du Peuple, *pour et au moyen des causes ci-dessus mentionnées*, une balance de £220 16 0, laquelle somme le Défendeur a reconnu devoir *légitimement*, et doit être condamné à la payer aux Demandeurs, tel qu'il est établi *comme susdit*, et la dite lettre ou reconnaissance produite."

De tous ces allégués, il ne résulte ni une demande ni une promesse personnelle ; au contraire, c'est au Détenteur que s'adresse la demande, et c'est en cette qualité qu'il y

(1) 11 Duranton, Tit 18, p. 149, et suiv.
2 Nouveau Pigeau, p. 481.

répond. Comme tel, il peut se libérer de la créance par le délaissement. Il ne paraît pas qu'il ait renoncé au bénéfice de ce moyen, et nous ne devons pas présumer une telle renonciation. Si les Demandeurs se fussent servi du terme *personnellement* au lieu de celui de *légitimement*, la promesse serait toujours restée qualifiée par ces termes, " tel qu'il est établi *comme susdit*."

La conclusion des Demandeurs ne découle donc pas des prémisses, d'où il ne peut résulter que le droit de s'en prendre au Défendeur comme Détenteur par action hypothécaire.

L'on ne *présuamera* jamais qu'un tiers Détenteur s'oblige personnellement et renonce au droit de délaisser, à moins que la promesse ne soit expresse et la renonciation formelle. Cette doctrine est celle de Loyseau et de Pothier, (1) reproduite par les autorités citées au Barreau.

MEREDITH, Juge, exprimant qu'il concourait dans la décision :—Jugement déboutant l'action avec dépens.

DUMOULIN et DE NIVERVILLE, pour les Demandeurs.

TURCOTTE, C. R. pour le Défendeur.

(1) Loyseau, du Déguerpissement liv. 4, ch. 4, Nos. 15 et 16, Pothier, Hyp. Edit. in 4o p. 444.

COUR SUPERIEURE.—MONTREAL.

Présents : DAY et SMITH, Juges.

1852. { BANQUE DE LA CITE,.....*Demandeurs*,
vs.
{ BROWN ET AL.....*Défendeurs*.

Jugé, que le cautionnement pour l'exécution des devoirs d'un officier de Banque, est mis au néant par la réduction du salaire stipulé, en faveur de cet officier, dans l'acte qui contenait tel cautionnement, et que cette réduction de salaire, sans la participation des cautions a l'effet d'une novation.

Held, that a bond conditional upon the due fulfilment of the duties of an officer in a Bank, is made void by the reduction of the salary stipulated, in favor of such officer, in and by the deed containing such bond, and that such reduction, without the consent of the sureties, has the effect of a novation.

Jugement 23 Mars, 1852.

Les Demandeurs, par acte authentique, avaient engagé le Défendeur, F. Brown, comme *Paying Teller*, à raison de £300 par an. A cet acte, les Défendeurs, Lyman et Perkins, C. J. Brown, et un nommé Tobin, intervinrent, et se reconurent obligés envers la Banque au paiement d'une somme de £2000 pour sûreté de l'exécution fidèle des devoirs du dit F. Brown, en sa qualité de *Paying Teller*.

Cet engagement était daté du 4 octobre, 1847.

Le 13 juin, 1849, F. Brown quitta le service de la Banque, et se trouva redevable à cette institution d'une somme de £246 5 0, qui lui était restée entre les mains des deniers appartenant à la Banque, et qui lui avait été confiés comme *Paying Teller*, dont il n'avait pas rendu compte, et qu'il avait gardée par devers lui.

Sur ces faits les Demandeurs concluaient solidairement contre Brown, et les trois autres Défendeurs, les cautions, au

remboursement de cette susdite somme de £246 5 0, avec intérêt et dépens.

A cette demande Lyman et Perkins plaidèrent séparément les mêmes moyens de défenses. Ils niaient d'abord le déficit en question, ainsi que l'avait fait Brown, et opposaient par exception que lors de l'engagement et du cautionnement en question, les Demandeurs payaient les services de Brown à raison de £300 ; que ce salaire fut stipulé au dit acte, et que sans cette stipulation les cautions n'auraient pas signé le cautionnement, et qu'ils auraient considéré le risque de cautionner trop considérable si le salaire eut été moindre.

Que vers le 21 septembre, 1848, les Demandeurs notifièrent Brown qu'ils ne l'emploieraient pas davantage à la condition du même salaire, mais offrirent de le continuer dans les mêmes fonctions, à raison de £225 par an, à compter du 1er décembre suivant, offre que Brown accepta ; le tout à l'insu des cautions ; que par là, il était intervenu entre les Demandeurs et Brown, un contrat nouveau et différent, et par lequel la position des cautions se trouvait empirée, et qu'à compter du 1er décembre, 1848, le cautionnement et engagement du 4 octobre, 1847, se trouvait innové, éteint et annulé, et remplacé par le dernier engagement ci-dessus mentionné, et que Brown ne devait aucune somme au 1er décembre, 1848, assurée par leur cautionnement, et qu'ils ne pouvaient être responsables des défalcactions survenues depuis cette époque.

Les Demandeurs en réponse nièrent la novation des contrats, et invoquaient contre les cautions le fait que l'un était Directeur et l'autre Actionnaire de la Banque, et en induisait la conclusion qu'ils connaissaient la réduction du salaire de Brown, qu'ils y acquiesçaient, ainsi qu'à la continuation de leur cautionnement.

La Cour maintint l'exception des cautions en observant qu'il n'est pas permis de déroger aux conditions de sem-

blables conventions sans le consentement formel de toutes les parties. Le Juge DAY, qui prononça le jugement, cita au soutien de la décision :—Répertoire de Merlin vbo. Novation, pp. 633-5-6.

Le jugement est dans les termes suivants :

“ The Court &c., proceeding to adjudge upon the issues
 “ raised between the Plaintiffs and the said Defendants,
 “ Wm. Lyman, John A. Perkins and Christian Julius
 “ Brown, sureties of the said Francis Brown, considering
 “ that the said Lyman, Perkins and C. J. Brown were parties
 “ to the said Bond and Agreement, and as such therein and
 “ thereby became the sureties of the said Francis Brown, as
 “ in the said declaration is alleged, and that the said Plain-
 “ tiffs and the said Francis Brown did afterwards, by mutual
 “ agreement, on the 21st September, 1848, without the inter-
 “ vention or consent of the said Lyman, Perkins and C. J.
 “ Brown, change certain of the terms and stipulations in the
 “ said Bond and Agreement contained, by agreeing upon and
 “ substituting the sum of £225 as the yearly salary of the
 “ said Francis Brown, for and in the place of the sum of
 “ £300 as stipulated in the said Bond and Agreement, and
 “ that by reason of such change and new agreement, and
 “ by law, the said Lyman, Perkins and C. J. Brown were
 “ and are discharged and released from all liability for or
 “ by reason of any debt, defalcation, matter or thing by him
 “ incurred, made or done after the time of the said change
 “ and new agreement, doth dismiss the action of the said
 “ Plaintiffs, in so far as the said Lyman, Perkins and C. J.
 “ Brown, are concerned, and doth condemn the Plaintiffs to
 “ pay to each of them the costs by him incurred in and about
 “ his defence to the said action.”

ROSE et MONK, pour les Demandeurs.

MACKEY et AUSTIN, pour Perkins.

MACK et MUIR, pour les autres Défendeurs.

SUPERIOR COURT.—QUEBEC.

Before DUVAL and MEREDITH, Justices.

No. 809 { BRUSH & AL.,.....*Plaintiffs*.
of { VS.
1852. { WILSON & AL.,.....*Defendants*.

Held, that a judgment rendered against a principal debtor upon an issue raised by him, is *res judicata* against a surety, who was not a party to the original cause.

Jugé, qu'un jugement rendu contre un débiteur principal sur une contestation élevée par lui, a force de chose jugée contre la caution, qui n'était pas partie à l'action originaire.

Judgment rendered the 7th April, 1852.

The Plaintiffs brought their action against the Defendants for the sum of £3000, under the following circumstances. On the 6th of September, 1844, the said Plaintiffs had agreed to construct a steam engine for one John Ryan ; the price thereof to be £6000. For the payment of the balance due upon this sum, to wit, £3000, Ryan had procured two sureties, *cautions solidaires*, Andrew Watson and Thomas White, and four *certificateurs de cautions*, Wilson, Patterson, Connolly and White, the Defendants in this cause.

The Plaintiffs alleged in their declaration, that they had impleaded Ryan, their principal debtor, and Andrew Watson and Thomas White as sureties, *cautions*, and obtained judgment against them, which judgment remained unpaid and unsatisfied. They also alleged the insolvency of the said Ryan and his sureties, and now brought their action against the *certificateurs de cautions*.

To this action, the Defendants pleaded that the work had been badly done ; to which the Plaintiffs answered that this plea had already been raised by the principal debtor, and

had been dismissed, and that this judgment had the *force de chose jugée* against the Defendants, the *certificateurs de cautions*.

To this answer of the Plaintiffs, the Defendants demurred, and alleged that the judgment invoked by the Plaintiffs was not rendered against them, nor were the said Defendants parties in any manner to the suit or action wherein the said judgment had been rendered, and that the same had not the effect of *res judicata* against the said Defendants, but were wholly *res inter alios acta*.

Upon this demurrer, a hearing took place, and the Court maintained the special answer of the Plaintiffs, and dismissed the demurrer. In rendering the judgment, DUVAL, Justice, observed : There is a distinction to be made, which is, that if the matter pleaded by the *caution*, is peculiar and personal to the *caution*, the plea is good, but if it has been pleaded by the principal debtor, the judgment rendered thereupon has the *force de chose jugée* against the *cautions*. (1)

The judgment is as follows :

"The Court having heard the Plaintiffs and the Defendants upon the Demurrer to the special answer of the Plaintiffs in this cause filed, considering that the allegations in the said special answer contained, are sufficient in law, if proved, to enable the said Plaintiffs to have and obtain the conclusions by them in their said special answer taken, and more particularly that the judgment mentioned and set forth by the Plaintiffs in the said special answer, has the *force de chose jugée* against the said Defendants, doth dismiss the said Demurrer with costs."

STUART and VANNOUOUS, for Plaintiffs.

ROSS and McCORD, for Defendants.

(1) Fethier, Oblig. No. 908.

COUR SUPÉRIEURE.—QUEBEC.

Présents : BOWEN, Juge-en-Chef, et MEREDITH, Juge.

No. 1417	{	A. MIGNIER,.....	<i>Demandeur,</i>
of			vs.
		P. MIGNIER,.....	<i>Défendeur,</i>
			et
1852.	{	P. MIGNIER, <i>es qualités,</i>	<i>Opposant.</i>

Jugé, que la nullité d'actes, invoquée dans une opposition afin d'annuler, ne peut être demandée à moins que toutes les parties à ces actes ne soient mises en cause ; et que dans tel cas, il faut intenter l'action révocatoire ou Paulienne.

Held, that the rescision of deeds, alleged in an opposition *afin d'annuler*, cannot be prayed for, unless all the parties to such deeds are joined in the proceedings ; and that in such case, recourse must be had to the revocatory action or *actio Pauliana*.

Jugement rendu le 14 Avril, 1852.

Dans cette cause, l'action originaire était portée par un père contre son fils pour aliments. Le 31 janvier, 1849, intervint un jugement qui condamna le Défendeur à payer au Demandeur une somme de cinquante-cinq louis, pour arrérages de rente viagère devenus dus pendant le cours de longues contestations entre les parties. En exécution de ce jugement, le Demandeur fit saisir, à défaut de meubles, l'immeuble du Défendeur. A cette exécution, le Défendeur, en sa qualité de tuteur à son propre fils mineur, répondit par une opposition afin d'annuler, alléguant que l'immeuble saisi n'appartenait point au Défendeur, mais à son fils, Joseph Mignier, représenté par lui comme tuteur, en vertu d'une donation faite au dit mineur par le nommé Joseph Côté, (son aïeul maternel,) en date du 28 juin, 1847, duement enregistrée le 12 juillet, même année.

Le Demandeur contesta cette opposition, et plaida, par exception, que le Défendeur était le seul vrai propriétaire et

possesseur de l'immeuble saisi, et que l'acte de donation sur lequel cette opposition était fondée, ainsi qu'un autre acte du 8 septembre, 1845, (étant une prétendue vente du même immeuble par le Défendeur au nommé Joseph Côté, son beau-père,) étaient des actes faux, simulés et frauduleux, faits et exécutés par le Défendeur dans le but de soustraire ses biens à la saisie de ses créanciers, et notamment du Demandeur, le tout sans cause ni considération. Les conclusions de cette exception demandaient l'annulation de ces actes, et le renvoi de l'opposition.

A cette exception, l'Opposant répliqua spécialement qu'il était vrai que cet immeuble était passé des mains du Défendeur en celles du nommé Côté, par l'acte de vente cité en son exception, consenti par le Défendeur et son épouse, mais que cet immeuble était un propre appartenant à Dame Félicité Côté, épouse du Défendeur, et fille du nommé Joseph Côté, suivant un acte de donation, du 6 octobre, 1832, par le dit Joseph Côté et son épouse à la dite Dame Félicité Côté ; et qu'aucun créancier du Défendeur n'avait droit de faire saisir ce *propre* de l'épouse du Défendeur, et se plaindre qu'il eût été vendu par fraude, et aussi donné par fraude. Il alléguait encore, que cette vente avait été faite par forme de dation en paiement, pour satisfaire une somme de £78 qui étaient alors due au dit Joseph Côté et son épouse pour arrérages de rente, en vertu de la donation faite à leur fille en 1832, la dite rente fixée par un acte du mois de février, 1837.

Il ajoutait encore, que la valeur de cet immeuble n'excédait pas ces arrérages de rente, et que la transaction avait eu lieu de bonne foi, et pour éviter des frais inutiles.

A l'appui de ses prétentions l'Opposant produisit en Cour, 1o. L'acte de donation par Côté et ux., à Félicité Côté, sa fille, de 1832 ; 2o. Un acte fixant une rente viagère payable

au nommé Côté et *ux.*, par Mignier, le Défendeur, et son épouse, de 1837 ; 3o. L'acte de vente par le Défendeur Mignier et *ux.*, au nommé Côté, du mois de septembre, 1845 ; 4o. Enfin, la donation par Joseph Côté à Joseph Mignier, le fils mineur du Défendeur. Il interrogea un témoin, qui prouva que l'immeuble donné en 1832, était le même que celui saisi en cette cause ; que la rente viagère de Côté et *ux.* valait £15 par année, et que lors de la transaction du mois de septembre, 1845, toute la rente était due, et qu'il était *parlé* de plus de £75 d'arrérages. Sur les transquestions, ce témoin admit que depuis son mariage avec Félicité Côté, arrivé avant 1837, le Défendeur avait toujours possédé et cultivé l'immeuble en question, et le possédait encore.

Les parties admirent qu'un second témoin prouverait les mêmes faits.

Le Demandeur, de sa part, produisit plusieurs des mêmes actes, et en outre, 1o. Une copie de la première action intentée par le Demandeur contre le Défendeur, le 6 août, 1845, rapportée en Cour le 25 du même mois, et jugée en définitive contre le Défendeur, le 3 décembre, 1847. 2o. 3o. et 4o. Trois exécutions émanées contre le Défendeur en 1848. 5o. Une admission de faits signée du Demandeur et du Défendeur en la présente cause, constatant qu'elle n'est qu'une suite de celle du mois d'août, 1845. 6o. Un retour de *nulla bona* filé par le Shérif en cette cause.

Les faits de la cause ainsi établis, le Demandeur soutenait que sa demande, commencée en août, 1845, avait précédé les transactions qu'il prétendait entachées de fraude, l'acte de vente du mois de septembre, 1845, et la donation du mois de juin, 1847 : d'où une première présomption de fraude.

Que l'Opposant avait négligé de prouver la valeur de l'immeuble saisi, afin d'écarter tout soupçon quant à la

transaction du mois de septembre, 1845 : d'où une seconde présomption de fraude.

Qu'enfin, le Défendeur était toujours resté en possession de l'immeuble saisi : d'où une troisième présomption de fraude.

Qu'en matière de transaction entre proches, la fraude se présume.

Que nonobstant les transactions multiples survenues entre les parties, il n'y avait jamais eu tradition de l'immeuble, qui était resté au Défendeur : d'où il résultait que tous ces actes étaient simulés.

Quant au dernier moyen invoqué par l'Opposant, que cet immeuble était un propre dans la personne de Dame Félicité Côté, non sujet aux poursuites des créanciers du mari, le Demandeur soutenait qu'il n'y avait aucune preuve légale que cet immeuble fut un propre ; et quand ce serait le cas, c'était de la part de l'Opposant exciper du droit d'antrui ; qu'il n'appartenait qu'à la Dame Félicité Côté de revendiquer cet immeuble comme *propre*, et qu'alors probablement il eut pu lui être répondu qu'elle l'avait ameubli par son contrat de mariage.

L'Opposant soutenait de son côté que l'action du Demandeur, de 1845, n'avait été portée que pour un terme de la rente viagère qui avait été satisfait, en sorte que le Demandeur n'avait point contre le Défendeur une créance antérieure à l'acte de vente de 1845 ; que cet acte de vente avait été fait de bonne foi pour satisfaire Côté d'une réclamation égale à la valeur de l'immeuble en question ; que cet immeuble était un propre de la femme du Défendeur, et non sujet aux dettes de son mari ; que d'ailleurs, Côté et son épouse auraient dû être parties à cette contestation, comme ayant des intérêts dans les actes

dont on demandait la nullité ; enfin, que le Défendeur n'était pas prouvé avoir été insolvable à l'époque de ces transactions ; et que Côté et son épouse avaient un privilège de bailleur de fonds sur l'immeuble dont il avait obtenu la dation en paiement.

Le jugement est en faveur de l'Opposant, comme suit :

“ La Cour.....considérant que lors de la donation faite par Côté à Mignier, fils, le 28 juin, 1847, Côté était propriétaire de l'immeuble en question en cette cause, en vertu de l'acte de vente du 8 septembre, 1845, considérant que le dit Côté n'étant pas partie en cette cause, le dit acte de vente ne peut être déclaré nul par son jugement prononcé sur une contestation liée entre le Demandeur et l'Opposant, déboute le Demandeur de sa contestation, et maintient l'opposition, &c. &c.”

LELIEVRE et ANGERS, pour le Demandeur.

BELLEAU, pour l'Opposant.

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QUEEN'S BENCH.—CROWN SIDE.—QUEBEC.

Before AYLWIN, Justice.

January { THE QUEEN, }  
Sittings { vs. } *Upon Indictment for Feloniously,*  
1852. { DOHERTY. } *breaking &c. a Machine.*

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An Apparatus for manufacturing potash, consisting of Ovens, Kettles, Tubs, &c., is not a Machine or Engine within the meaning of the 4th and 5th Victoria, cap. 26, sec. 5; the cutting, breaking or damaging of which is felonious.

Un appareil pour la manufacture de potasse, consistant en Fours, Chaudrons, Cuves, etc., n'est pas une machine ou engin, aux termes de l'Acte des 4e et 5e Vic. ch. 26, sec. 5, dont la destruction ou détérioration est une félonie.

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This was an indictment against Thomas Doherty, for cutting, breaking and destroying a machine for the manufacture of potash.

The indictment was framed under the 4th and 5th Victoria, cap. 26. By the 5th section of this Statute, it is enacted, "That if any person shall unlawfully and maliciously cut, break or destroy, or damage, with intent to destroy or render useless any threshing machine, or any machine or engine, whether fixed or moveable, prepared for, or employed in any manufacture whatsoever, (except the manufacture of silk, &c., &c.,) and being convicted thereof, &c., &c., &c."

The indictment charged the prisoner with cutting, breaking and destroying "a certain machine prepared for and employed in the manufacture of potash, of the value of £50, the property of one Ellen Ruddy." A witness having described the apparatus for manufacturing potash, mentioned in the indictment, as consisting of Ovens, Kettles, Tubs, it was made a question whether a machine, such as described by the witness, came within the meaning of the 5th section of the Statute above cited.

AYLWIN, Justice : The apparatus described by the witness does not come within this meaning, for it is of the most primitive and rude character, consisting of a Chimney, an Oven, and a Tub ; I am therefore of opinion to stop this case. A machine signifies "*any thing used to augment or regulate moving forces or powers, or it is any instrument employed to produce motion, in order to save either time or force.*" The object of the Legislature, in passing the Statute upon which this indictment has been framed, was specifically to punish the destruction, by handicraftsmen and agricultural laborers, or others, of those inventions of modern science, which have superseded the accustomed manual labor of past times, more or less.

The ATTORNEY GENERAL, for the Prosecution.  
POPE, for the Prisoner.

## SUPERIOR COURT.—QUEBEC.

Before BOWEN, Chief Justice, and MEREDITH, Justice.

No. 1454 } LEVEY ..... *Plaintiff*,  
 of }  
 1851. } LOWMEYER ..... *Defendant*.  
 vs.

The Defendant undertook to deliver, and the Plaintiff agreed to receive, 14,000 feet Birch timber, merchantable and averaging a certain size, the said timber to be piled on the Defendant's wharves during the winter of 1844-5, and to be delivered, as required by the Plaintiff, during the ensuing season of navigation; a quantity of timber, piled up on the wharves of the Defendant, was destroyed by fire during the winter, before it had been measured as between the Plaintiff and the Defendant. Held, that there had been no delivery of any timber by the Defendant to the Plaintiff, 1stly. Because there had been no measurement of the Timber; 2ndly. Because, therefore, the timber had not been ascertained to be of the requisite average size; and 3rdly. Because the timber had not been ascertained to be of the required quality.

Le Défendeur entreprit de livrer, et le Demandeur de recevoir, 14,000 pieds de merisier, bois marchand et de certaine dimension spécifique, lequel bois serait empilé sur les quais du Défendeur, pendant l'hiver de 1844-5, et livré au Demandeur à mesure qu'il en aurait besoin, pendant la saison de la navigation ensuivante; une quantité de bois empilée sur les quais du Défendeur fut détruite pendant l'hiver avant que ce bois eut été mesuré conjointement par le Demandeur et le Défendeur. Jugé, qu'il n'y avait eu aucune livraison par le Défendeur au Demandeur, 1o. Parce qu'il n'y avait eu aucun mesurage du bois en question; 2o. Parceque, conséquemment, il n'avait pas été constaté que le dit bois fut de la dimension spécifique requise; et 3o. Parceque, enfin, le dit bois n'avait pas été constaté être de la qualité requise.

Judgment the 1st July, 1851.

The action was brought upon a contract of sale of a quantity of timber, by the buyer against the seller, in damages for non-fulfilment of the said contract, and for the recovery back of certain sums of money paid in advance, by the Plaintiff to the Defendant.

The declaration alleged, that on the 18th of December, 1844, the Plaintiff bargained with the Defendant to buy of him 14,000 feet of merchantable birch timber, to average sixteen inches, at the rate of eight pence per foot, in full of all



charges, excepting six pence for each log received, and one shilling and three pence for each log, shipping charges, the said timber to be collected from the country north of Quebec, and piled on the wharves of the Defendant, in St. Paul street, during the then present winter, and to be delivered as required by the said Plaintiff, during the then ensuing season of navigation, and payment of the purchase money agreed upon, to be made from time to time during the then present winter, as the timber was piled ready for delivery. That although the Plaintiff paid, as required by the Defendant, the sum of £488 10s. 10d., the price agreed upon, he, the said Defendant, refused to deliver the said timber, &c., &c., to the damage of the Plaintiff, &c., &c.

To this action the Defendant pleaded, 1stly. The general issue; and 2ndly. A perpetual peremptory exception, in which, among other things, it is alleged: "That, after the  
 " making of the said agreement, to wit, between the 12th day  
 " of December, in the year of Our Lord, 1844, and the 25th  
 " day of April, in the year of Our Lord, 1845, the timber in  
 " the said agreement mentioned, to wit, fourteen thousand  
 " feet of Birch timber, of the dimension, quality and de-  
 " scription therein specified, was collected by the said De-  
 " fendant, in the manner and from the places in the said  
 " agreement also specified; and the said timber, during the  
 " time aforesaid, was piled, as stated in the said agreement,  
 " and for the purposes therein specified, on the wharf of the  
 " said Defendant therein also mentioned; whereof the said  
 " Plaintiff afterwards, to wit, on the day and year last afore-  
 " said, at the city of Quebec aforesaid, had notice; and  
 " thereupon he, the said Plaintiff, received the said timber,  
 " and paid for the same as provided in and by the said  
 " agreement. And the said Defendant further saith, that  
 " after the said timber was so collected, piled, received and  
 " paid for, as aforesaid, and while the same remained upon

“ the wharves aforesaid, subject to the order and disposal of  
 “ the said Plaintiff, to wit, on the 28th day of May, in the  
 “ year last aforesaid, the said timber was casually burnt,  
 “ consumed and destroyed by fire, without neglect or default  
 “ of the said Defendant, to wit, at the city of Quebec.”

The Plaintiff, having taken issue upon these pleadings, and the parties having proceeded to *enquête*, they were respectively heard upon the merits.

**PRIMROSE** for Plaintiff: The main question is as to the delivery of the timber by the Defendant to the Plaintiff. The pretension of the Plaintiff is that no such delivery had taken place. Payments had been made in advance; a certain quantity of timber had been piled upon the wharves of the Defendant: but the delivery to the Plaintiff was to have been made when required, during the season of navigation. That delivery had not been required and had not been made, and consequently the sale was not complete. The timber had not been set apart, culled, marked and measured according to the contract (1).

**O. STUART**, for Defendant: The timber had been collected and piled by the Defendant, and received and paid for by the Plaintiff, and was at the risk of the latter. The rule to be followed in this instance is laid down by Pothier, *Contrat de Vente*, No. 307, he says “ It is a principle that as soon as the contract of sale is perfected, the thing is at the risk of the buyer, though it is not delivered to him; so that, if during this period it happens to perish, without the seller’s fault, the

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(1) 2 Maule and Selwyn, p. 391, Busk vs. Davis:—2 Campbell, p. 240, Zagury vs. Furnell:—11 East, p. 210, Rugg vs. Minett:—4 Law Magazine, pp. 137, 138:—1 Alton on Bankruptcy, p. 318:—6 East, p. 614, Hanson vs. Meyer:—16 Continuation de Toullier par Duvergier, No. 38:—Tropolong, Vente, Nos. 82, 83, 85:—1 Pothier, Vente, Nos. 308-9-10:—4 Pothier, Traité de la Propriété, Nos. 245-6-7:—1 Taunton, 318, Macklow vs. Mangles:—4 Taunton, 644, Austen vs. Craven:—13 East 532, Wallace vs. Breeds.

seller is discharged, while the buyer still remains bound to pay the price agreed upon," &c. &c. *Idem* No. 308 (1).

There are, in this case, all the requisites to constitute a contract of sale, *res, pretium, consensus*; 875 pieces of birch, containing 14,000 feet, upon which receiving charges have been paid; £466 13s. 4d. as the price of the same; and the consent of parties as well in respect of the thing sold as of the price thereof. Each payment was a specific delivery of the quantity so paid for and piled upon the wharf, so as to vest the property in the Plaintiff, leaving the Defendant liable to no greater obligations than those which usually belong to wharfingers or bailees.

I hold as good the three following propositions:

1. That the contract of sale was complete, and thereby the property vested in the Plaintiff, and that, therefore, the price paid cannot be recovered back.

2. That as soon as the contract of sale was perfected, the 875 pieces of birch timber were at the risk of the buyer, even if not delivered, though according to the usage of the trade they were.

3. That the Defendant, after the payment of the price, became a mere bailee and agent of the Plaintiff, and was only bound to use the same diligence, and to take the same care of the timber as he would have done if the property had been his own, and was not responsible for the loss which had arisen from a *vis major* (2).

(1) *Troplong, Vente*, No. 357:—*Story, on Sales of Personal Property*, p. 255, s. 316.

(2) 4 *Adolphus and Ellis*, 448, *Clarke vs. Spence*:—5 *Bar. and Ald*, 942, *Woods vs. Russell*:—2 *Meeson and Welsby*, 614 to 617, *Laidler vs. Burlinson*:—8 *Barn. and Cres.* 282, *Atkinson vs. Bell*:—2 *Bing, Rep.* 277, *Caruthers vs. Payne*:—5 *Barn and Cres.* 73, 78, *Oldfield vs. Lowe*:—*Stuart's Rep.* 101; *McDonall vs. Fraser*, and the authorities there cited.

**MEREDITH J.**—The contract which has given rise to the present controversy, bears date on the 12th December, 1844, and is in effect as follows :

“ James J. Lowndes, contracts to deliver, and Charles E. Levy, agrees to receive 14,000 feet of merchantable birch timber, to average 16 inches, at the rate of eight pence currency per foot, in full of all charges, excepting six pence per log, receiving charges, and one shilling and three pence per log shipping charges, the said timber to be piled on the wharves of Mr. Lowndes, during the present winter, and to be delivered as required by the purchaser, during the ensuing season of navigation.”

“ Payment to be made from time to time during the present winter, as the timber is piled ready for delivery. It is understood that the timber is to be properly covered in the spring so as to prevent its being injured by the sun.”

The evidence as to the manner in which the above contract was carried out is very contradictory. Mr. Herring, the Plaintiff's chief clerk, swears that he repeatedly requested Mr. Lowndes to pile the timber intended for the Plaintiff separately, but that Mr. Lowndes told him, that in consequence of his having contracts with other Merchants he could not do so, and this witness distinctly asserts that this was not done. Speaking of the pile of timber, which the Defendant asserts was intended for the Plaintiff, this witness says : “ I have been frequently to Mr. Lowndes's wharf in “ St. Paul street, for the purpose of seeing the timber coming “ in and piling : I saw in those visits to the said wharf a “ large quantity of Birch timber piled there in a mass, “ perhaps three times the quantity mentioned in the contract.”

On the other hand Mr. Robert H. Jellard, who was in the employ of Mr. Lowndes as a clerk and shipping culler, declares that the timber intended for the Plaintiff was piled

separately from Mr. Lowndes's other timber. On this subject the witness says : " In the operation of collecting and piling  
 " the said timber, that which was intended for the Plaintiff  
 " was piled separately, and the commencement of the pile  
 " was marked with his initials—it was just the commence-  
 " ment of the pile, the part of the ground tier that was marked  
 " with his initials might consist of from 20 to 30 pieces.  
 " All the rest of the timber intended for the Plaintiff was  
 " afterwards piled at the same place, and was pointed out  
 " by Mr. Patton to Mr. Herring as the timber intended for  
 " Mr. Levy."

It is proper to mention that Mr. Jellard went to the country in the beginning of February, when it would appear by the evidence of record, that not more than a fourth of the timber in question had been collected (see receipt of 3rd February, 1845,) and that after he so went to the country, the witness visited the wharf in town about once a week only. It is therefore possible, that although the pile may have been commenced exclusively for Mr. Levy, yet that that idea may have been abandoned without the knowledge of the witness.

In this way only can the apparently very contradictory statements of Mr. Herring and Mr. Jellard be reconciled.

The Defendants' counsel referred to the evidence of Mr. Tims, who, at the time, was Mr. Lowndes's book keeper, and who says he was almost daily at the wharf, and also to the evidence of Mr. Bolduc, then Mr. Lowndes's foreman, as corroborating the evidence of Mr. Jellard.

What appears to us, however, as being of most importance with respect to the testimony of these witnesses is, that neither of them says, he had any knowledge that the pile of timber in question was intended exclusively for the Plaintiff. Considering the situations that these witnesses held in Mr. Lowndes's employment, it might reasonably have been ex-

pected, that had the intention which was entertained when the first tier of the pile was formed, been persevered in, until the completion of the pile, that that intention would have been known to these witnesses.

Great stress was also laid by the Defendants on the Bill of parcels which was filed by the Plaintiff as his Exhibit No. 3, and which is as follows :

Quebec, 1st March, 1845.

Messrs. C. E. LEVY & Co.,

Dr. to JAS. J. LOWNDES,

To 14000 feet of Birch timber to average

16 inches,

£466 13 4

To receiving charges on 875 p. a 6d.

shipping charges, delivery 15d. per stick, 21 17 6

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488 10 10

By cash at sundry,

415 0 0

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73 10 10

Received payment,

JAS. J. LOWNDES.

25th April, 1845.

This paper was referred to by the Defendants, as shewing that the logs contained in the pile had been counted and measured, and the whole appropriated to the Plaintiff with his consent.

As without the evidence which the Defendants think they can derive from this paper, the important facts of counting and measuring are not proved, it is proper that that paper should receive particular attention.

At the time this Bill of parcels was prepared, it is admitted that in pursuance of the contract between the parties Mr.

Lowndes had as much timber piled on his wharf ready for delivery as the Plaintiff could claim under the contract. Mr. Lowndes had therefore, under the contract, a right to claim the balance of the price of the timber.

Under these circumstances, independently of any specific appropriation of the pile of timber, Mr. Lowndes had a right to debit the Plaintiff with 14000 feet of timber. And therefore the first item in the Bill of parcels is unimportant, for whatever may have been the facts of the case, that item would have been worded as it is worded.

The second item in the account is certainly equivalent to a declaration on the part of Mr. Lowndes, that he had then on his wharf ready for delivery under the contract 875 logs of birch timber, containing 14000 feet. But the payment of the account cannot be regarded as causing even a presumption against the Plaintiff of any thing more than this ; that so far as he had then the means of ascertaining, he was satisfied that Mr. Lowndes had then on his wharf ready for delivery a quantity of timber sufficient to fulfil his contract with the Plaintiff.

It is not contended that from the payment of the account, a delivery of the timber is to be inferred, for under the contract the payment was to be made in the course of the winter, although the delivery of the timber was not to take place until the following season of navigation ; nor can it be contended that the rendering of the account, or the payment of it, proves that as between the Plaintiff and Mr. Lowndes the timber was measured, for at the time of the rendering of the account the timber was in a pile described by Mr. Jellard as being about 12 feet high and 20 feet wide, and the evidence places it beyond doubt, that this pile was not deranged for the purpose of measurement, or for any other purpose, from the time it was formed until it was burned.

Considering these facts, and bearing in mind that Mr. Jellard (who was not employed in Mr. Lowndes's timber yard after the beginning of February) is the only witness who says that the pile of timber burned had been set apart for the Plaintiff, and that this witness admits he has no positive knowledge either as to the quantity or size of the timber contained in the pile, and bearing in mind also, that neither Mr. Lowndes's foreman nor his book keeper confirms the statement of Mr. Jellard, that the pile of timber burned had been appropriated to the Plaintiff, by asserting a knowledge of that fact, and bearing in mind in fine, that Mr. Jellard's statement in this respect, has been contradicted in the most unqualified manner by Mr. Herring, we are of opinion that the Defendants have not legally established the exclusive appropriation to the Plaintiff of the pile of timber that was burned, or the quantity, quality or size, of the timber contained in that pile.

Assuming, however, for the sake of argument, that the pile of timber burned contained the whole of the birch intended for the Plaintiff, and none other, and assuming also, that by measurement between Mr. Lowndes and the parties from whom he purchased the timber, it had been ascertained that the pile was formed of 875 pieces of timber, containing 14,000 feet, and this is the utmost that the Defendants could ask to be considered proved, we would still be of opinion that the Plaintiff ought to succeed, and this for the following reasons: 1stly. Because, although as between Mr. Lowndes and the persons from whom he obtained the timber it may have been measured, yet as between Mr. Lowndes and the Plaintiff, the timber, at the time of the fire, remained subject to measurement. 2ndly. Because, if at the time of the delivery of the timber under the contract, any part of it had been found unmerchantable, the Plaintiff would have had a right to reject it. Lastly and chiefly, Because, if, on the



measurement of the timber, it had been found not to average 16 inches, as required by the contract, the Plaintiff would have had a right to compel Mr. Lowndes to remove a part of the pile, and to substitute for the timber removed, timber of a larger size, so as to make up the average size required; and in default of this being done to reject the whole.

As to the measurement, it is not, I believe, contended that as between the Plaintiff and Mr. Lowndes, the timber had ever been measured.

As to the right of the Plaintiff to have examined the timber, to ascertain whether or not it was merchantable, it is true that Mr. Herring visited Mr. Lowndes's wharf very frequently whilst the timber was being collected, but this did not afford him an opportunity of seeing that each log was merchantable, and it cannot be presumed that he renounced the right which the Plaintiff had under the contract of seeing that such was the case.

As to the average size of the timber required by the contract, Mr. Herring could not, whilst the timber was being collected, have objected to timber as being undersized, because the timber remaining to be collected might make up the average.

The average size of the timber was a matter of great importance, for birch averaging thirteen inches was worth but 7½d, whilst birch averaging 16 inches was worth 13½d; and there appears to have been a corresponding difference between other sizes.

It is also highly important to observe, that the bill of parcels upon which the Defendants place so much stress, speaks of "14,000 feet of birch timber to average 16 inches" and not of birch timber averaging 16 inches; thus showing, that it had still to be ascertained by measurement, whether or not the timber did average 16 inches.

So far then was the subject of the contract from being perfectly certain, that it is quite possible, even if the fire had not occurred, that not one log of the pile would ever have belonged to the Plaintiff. This appears to us as being the most important point in the case, and we regard it as decisive in favor of the Plaintiff.

I shall now briefly advert to the authorities cited by the Defendants.

The principal authorities from the French law quoted by the Defendants, are Pothier, Vente Nos. 308, 9, 10, and Troplong, Vente No. 357.

The authority in Pothier is familiar to every lawyer, but still it expresses the law on the subject so clearly, that I shall read that part of it which appears to me most applicable upon the present occasion.

“Après avoir établi que la chose vendue devient aux risques de l'acheteur aussitôt que le contrat de vente a reçu sa perfection, il faut discuter quand est-ce que le contrat a reçu sa perfection.”

“Ordinairement le contrat de vente est censé avoir reçu sa perfection aussitôt que les parties sont convenues du prix pour lequel la chose serait vendue. Cette règle a lieu lorsque la vente est d'un corps certain, et qu'elle est pure et simple, *si id quod venierit appareat quid, quale quantumve sit, et pretium, et purè venit ; perfecta est emptio.*”

“Si la vente est de ces choses qui consistent *in quantitate*, et qui se vendent au poids, au nombre, ou à la mesure, comme si l'on a vendu dix muids de blé de celui qui est dans un tel grenier, la vente n'est par parfaite que le blé n'ait été mesuré, car jusqu'à ce temps, *nondum apparet quid venierit.....*”

“ Cette décision a lieu non seulement lorsqu'on a vendu une certaine quantité de marchandises à prendre dans un magasin où il peut y en avoir d'avantage, parcequ'en ce cas, comme nous venons de le dire, jusqu'à ce que la mesure ou le poids en ait été fait, ce qui a été vendu ne consiste encore en aucun corps déterminé sur lequel le risque puisse tomber; elle a lieu aussi dans le cas où l'on aurait vendu tout ce qu'il y a dans un magasin, dans un grenier, si la vente en a été faite à raison de tant par chaque millier, muid de blé, &c.”

“ La vente en ce cas n'est point censée parfaite, et les marchandises vendues ne sont point aux risques de l'acheteur, jusqu'à ce qu'elles aient été mesurées ou pesées; car jusqu'à ce temps, *non apparet quantum venierit.*”

According then to Pothier, the mere fact of the property sold being subject to measurement, was of itself sufficient to cause the risk to remain with the seller. In the present case, however, the timber was not only subject to measurement, but, as has been already observed, the Plaintiff had a right to examine it, in order to satisfy himself that it was merchantable, and the measurement was necessary not only to ascertain the quantity of the timber, but also to ascertain that it was of the size required by the contract.

We know that the rule laid down by Pothier, to which I have adverted, has been questioned, but I have not any where seen it asserted that the risk should be held to have passed from the seller to the purchaser, whilst the subject of the sale remained indefinite and uncertain as, we are of opinion, it did in the present case.

The authority from Troplong, (Vente No. 357,) is not at all opposed to the pretensions of the Plaintiff; and the opinion of that author at Nos. 82, 83 and 85 of the same work, is in exact accordance with that of Pothier.

The Defendants, in addition to the authorities cited from Pothier and Troplong, referred to a number of English cases.

Of these, the case of *Clarke vs. Spence* 4, Ad. and El. 448, is, we think, the most favorable to the pretensions of the Defendants, and I shall state the facts of that case as condensed by the Reporter.

“ P. contracted with a ship-builder to build him a ship, to be paid for by instalments; the first instalment when the vessel was rammed, the second when she was timbered, &c. An agent for P. was to superintend the building. The vessel was built under such superintendence, all the materials being approved by the Superintendent before they were used. The builder became bankrupt before the ship was completed. Afterwards the assignees completed the ship. All the instalments were paid or tendered. In an action of trover by P., against the assignees for the ship, it was held that on the first instalment being paid, the property, in the portion then finished, became, by virtue of the above contract, vested in P., subject to the rights of the builder to retain such portion for the purpose of completing the work and earning the rest of the price, and that each material subsequently added, became, as it was added, the property of P., the general owner.”

The Court in rendering this judgment admitted that they felt some hesitation in doing so, and rested their decision upon the authority of the first case cited by the Defendants (in the present cause), namely, the case of *Woods vs. Russel*, which arose out of a similar contract.

Without expressing any opinion as to how these two cases would have been decided under our law, it is sufficient to observe in relation to them, that as soon as the materials were used in the ship, there could not, so far as they were concerned, be any thing uncertain or indefinite about the

subject of the sale. The Superintendent employed, proved  
 “ that he had been for several years employed to inspect  
 “ ships for various persons, in the progress of building, and  
 “ that he never knew an instance of a single timber or plank  
 “ that had been passed by him and fixed in the vessel,  
 “ having been afterwards removed by the builder.”

Judge Bayley (8 B. and C. 277,) adverting to Woods and Russel, said : “ The foundation of that decision was, that as  
 “ by the contract given portions of the price were to be paid  
 “ according to the progress of the work, by the payment of  
 “ those portions of the price, the ship *was irrevocably appropriated*  
 “ *to the person paying the money.*”

In the present case, even if it be thought that there was any appropriation, that appropriation was not irrevocable as in Clarke vs. Spence, but on the contrary was conditional, the conditions being : firstly, that the timber should be found merchantable, and secondly, that it should average 16 inches.

The other English cases cited by the Defendants are, we think, so plainly distinguishable from the case now under consideration, that we do not deem it necessary to compare each of them separately with the present case.

In no one of those cases was the subject of the sale to be measured, subsequently to the time, at which the transmission of the ownership to the purchaser, was (by the law of England) decided to have taken place.

In no one of those cases, was the property which was the subject of the contract, and with respect to which the transmission of ownership was decided to have taken place, liable to rejection for not being of a particular quality or size, or for any such reason.

In these important, and it appears to us essential particulars, we think that the present case differs from those cited by the Defendants.

Such being our views, it follows, that we are of opinion the Plaintiff's action must be maintained.

As to the damages, which are to be regulated by the market price of timber, such as that mentioned in the contract, on the 13th July, when the Plaintiff made his demand, we think we ought to adopt the price mentioned in the evidence of Mr. H. N. Patton, whose testimony on this point differs but little from that of Mr. Roberts, another of the Defendants' witnesses.—Mr. Patton says, that from the 1st June to the 26th July, 1845, the price of Lower Canada Birch averaging 16 inches was 13d. The Defendants cannot feel aggrieved by our adopting this estimate, as their own witnesses have furnished it; nor can the Plaintiff complain, for he ought to have proved the market price in July which he has failed to do.

The judgment in favor of the Plaintiff is therefore for £787 10 0 with interest from the service of process, and costs of suit.

It is as follows :

“ It is by the Court now here considered and adjudged, that the said Perpetual Exception of the Defendant be, and the same is hereby dismissed ; and considering that the Plaintiff hath established by the evidence of record that he did well and faithfully perform and fulfil all the obligations by him to be performed and fulfilled under and by virtue of the agreement between him and the said James John Lowndes, bearing date the 12th day of December, 1844, and filed in this cause as the Plaintiff's Exhibit No. 1, and that he the said Plaintiff did pay to the said James John Lowndes

the full price by him payable for the fourteen thousand feet of birch timber, mentioned in the said agreement, but that the said James John Lowndes failed to deliver the said quantity of fourteen thousand feet of birch timber, or any part thereof to the Plaintiff, on the 15th day of July, 1845, when the said Plaintiff had a right to demand, and did demand delivery of the same, and considering that on the said 15th day of July, 1845, the said 14,000 feet birch timber, at the place where the same ought to have been delivered, was reasonably worth the sum of £787 10 0 currency. It is in consequence by the Court now here, considered and adjudged that the said Plaintiff do recover from the said Mary Anne Skitt, Defendant *par reprise d'instance*, in her capacity as such universal legatee as aforesaid, the said sum of £787 10 0 currency, with interest thereon, from the 15th day of September, 1845, until paid, and costs of suit.

PRIMROSE, for Plaintiff.

STUART, O. for Defendant.

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## COUR SUPERIEURE.—QUEBEC.

Présents : BOWEN, Juge-en-Chef, DUVAL et MEREDITH, Juges.

No. 1731 { GAUTHIER,..... Demandeur,  
de { vs.  
1852. { LEMIEUX,..... Défendeur.

Jugé, que les frais dans une cause ne peuvent être saisis et arrêtés, pendant l'instance, comme appartenant à la partie, par un tiers, son créancier, au préjudice du Procureur.

Held, that costs in a cause cannot be attached by a creditor, during the pendency of a cause, as belonging to the party, to the prejudice of the Attorney.

Jugement rendu le 14e Avril, 1852.

Pendant la litispendance, un tiers, créancier du Demandeur, avait fait saisir-arrêter entre les mains du Défendeur le montant dû au Demandeur.

Le Défendeur paya au créancier saisissant le montant qu'il reconnaissait devoir, ainsi que les frais encourus dans la cause, jusqu'au jour où la saisie-arrêt avait été signifiée, et plaida ce paiement.

La Cour, par son jugement, déclara ce paiement valable quant au principal et intérêts, mais condamna le Défendeur à payer de nouveau les frais qu'il avait payés au créancier saisissant, et condamna le Demandeur à payer tous les autres frais subséquents.

DUVAL, Juge : “ Les frais appartiennent à l'Avocat, et ils n'ont pu être saisis et arrêtés comme appartenant au Demandeur, avant que l'Avocat ait eu l'occasion d'en demander la distraction.”

Les Procureurs du Demandeur firent alors une motion pour distraction de frais, qui leur fut accordée.

GAUTHIER et LEMIEUX, pour le Demandeur.

CASAVULT et LANGLOIS, pour le Défendeur.



## SUPERIOR COURT.—QUEBEC.

Before : DUVAL and MEREDITH, Justices.

No. 739 { *Ex parte* :—  
of  
1852.

PATRICK LAWLOR ;

*Petitioner.*

The Mayor and Councillors of the City of Quebec, under the 14th and 15th Vict. Cap. 100, Sects. 5th and 6th, have a discretionary power as to the confirming or refusing to confirm certificates for Tavern licenses ; and, in the exercise of the discretionary power so vested in them, they are not liable to be controlled by the Superior Court, or the Judges of that Court in vacation.

Le Maire et les Conseillers de la Cité de Québec, en vertu de la 14e et 15e Vic. Chap. 100, Sects. 5ème et 6ème, ont un pouvoir discrétionnaire quant à la confirmation ou au refus de confirmer les certificats pour licences d'auberge ; et, dans l'exercice du pouvoir discrétionnaire qui leur est confié, ils ne sont pas sujets au contrôle de la Cour Supérieure ou des juges de cette Cour en vacance.

Judgment rendered the 8th June, 1852.

In his petition for a Writ of Mandamus, the Applicant alleged that he had been a licensed Tavernkeeper in the St. Roch Ward of the City of Quebec, for the last 7 years. That on the 4th March last, he applied for a renewal of his license to the Municipal Council of the Corporation of the Mayor and Councillors of the City of Quebec, and presented, at the same time, the necessary certificate and affidavit, in that behalf required by the Statute, and required the Council, after due deliberation thereon, to approve the same, so that the Petitioner might be enabled to present the same to the Revenue Inspector, and obtain his license.

That the Petitioner's application, together with several others from persons residing in the same Ward, and from other residents in the other Wards of the City, was referred, by the Council, to the Police Committee for enquiring into the merits of each case, which latter body, on the 5th April last, recommended the confirmation thereof.

That on the 23d April, a petition, praying that no certificate or application for a Tavern License in the said St. Roch Ward, should be approved or allowed by the said Council, was presented to the latter by certain inhabitants of St. Roch, to the number of five hundred and upwards, who appeared *en masse* before the Council, for the purpose, by intimidation, of coercing the Members of the said Council then present to grant the prayer of their said petition. That thereupon, it was ordered, that this latter petition, together with the report of the Police Committee recommending the confirmation of Lawlor's certificate, should be taken into consideration simultaneously.

That on the same day, the Council, not regarding their duty, absolutely neglected and refused to deliberate upon the merits of Lawlor's application, as they were enjoined to do by the Statute, but, on the contrary, granted the prayer of the petition of the inhabitants of St. Roch Ward, to the effect that no certificate for a Tavern License in that Ward should be confirmed by the Council, and the Council then rejected Lawlor's application as well as those of the other applicants simultaneously and indiscriminately, without any deliberation whatever on the respective qualifications and fitness of the several applicants, and ordered that the same should not be confirmed; thereby, without any legitimate cause or reason, and without due deliberation, rejecting Lawlor's application, to the manifest obstruction of justice and of the Statute, and to the consequent demoralization of the inhabitants of Quebec, to the injury of the public revenue, and to the great damage and grievance of the petitioner Lawlor.

That the Council had granted licenses to persons residing in the other Wards of Quebec, St. Roch Ward alone excepted.

That the Council were bound to grant licenses to fit and proper persons by law duly qualified, and that the Council

could not, in the proper discharge of their duty, refuse to deliberate upon and approve the necessary certificates of applicants to that effect, except upon good and sufficient legal grounds to be set forth by the Council. That the petition from the inhabitants of St. Roch Ward was illegal, and repugnant to the provisions of the Statute.

Wherefore, it was prayed that a Writ of Mandamus, directed to the Mayor and Councillors of the City of Quebec, should issue, commanding and firmly enjoining them duly to deliberate upon the petitioner's application for a license to keep a house of public entertainment in the St. Roch Ward of Quebec, and thereupon, after such due deliberation, to approve and grant the same, unless upon good and sufficient legal cause to the contrary to be set forth by the Council, and to make such order, in reference to the same, as might be in accordance with justice and the Statute of the Province.

The petitioner made oath to the truth of the facts contained in the petition.

Ross, DUNBAR, appeared for the petitioner, and after having stated at length the facts of the case, said: The Municipal Council has, by the Prov. Stat. 14 & 15 Vic. Cap. 100, Sec. 5, been invested with certain attributions in relation to the confirmation of certificates of parties applying for Tavern licenses. That section enacts: "That no license shall be granted to any person for keeping an Inn, Tavern .....or place of public entertainment in any part of Lower Canada, unless the person applying for the same shall produce to the Revenue Inspector a Certificate signed by fifty Municipal Electors of the ..... Ward of the City, in which such house of entertainment is situated, and approved after due deliberation by the Municipal Council ..... of the Incorporated City ..... within

“the limits of which such Inn, Tavern ..... or place of public entertainment, is intended to be kept, in the form expressed in Schedule (B) annexed to this Act, and signed by the Mayor and Secretary of such Council.”

The schedule B referred to is a certificate to be signed by 50 of the Municipal Electors of the Ward, to the effect that the Applicant, who is desirous of obtaining the license, is personally known to each of them, that he is a British subject, honest, sober and of good repute, and that he is a fit and proper person for keeping a house of public entertainment. (1)

Then follows the confirmation of the Council : “The foregoing Certificate having been this day submitted to the Municipal Council of.....and the said Council being duly assembled, and having deliberated thereon, confirm the said Certificate in favor of                      therein mentioned.”

By this clause no discretionary power to refuse is left to the Council,—there is a power only to approve after mature deliberation. The Council were charged with the duty of ascertaining if the requirements of law had been complied with, and if the Applicant was a fit and proper person, and if so, then they were to approve his Certificate. This limited duty or power of the Council, is wholly different from the extensive powers formerly vested by the laws of this Province, in the Justices of the Peace who were sole arbiters of the right to grant or refuse Tavern licenses.

The Council, in virtue of the powers conferred on them by the Act of Incorporation (3 and 4 Vic. Cap. 35, S. 40,) referred the Petitioner's application to the Police Committee,

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(1) This Certificate contains another allegation which is to be added “*If in Country parts,*” and a different allegation “*When in Country parts.*” The distinction would seem not to be susceptible of a difference, but it does not appear that such other allegation is necessary when within a City.—*Vide* 14 and 15 Vic. Chap. 100, schedule B.

which consists of certain members of their own body, and which by a By-law of the Council have a general superintendence over these matters.

The Police Committee made a report to the Council recommending Lawlor's application ; it then became the duty of the Council to deliberate thereon, but that body has not done so, for they have rejected Lawlor's application, with a number of others, *en bloc*, without any attempt at discrimination, and consequently they cannot have deliberated upon the merits of each particular application.

The Council have utterly misapprehended the nature of the power conferred upon them, for they possess no absolute power to reject the application—the power is to confirm and approve the Certificate ; their jurisdiction is limited by the Statute.

The 6th Section of the same act presumes a case which supports Lawlor's position, for it is thereby provided, that if on the day appointed for holding a meeting of a Municipal Council there be no *quorum* present, any Certificate in the form (B) prescribed by the Act, *submitted to such Council for confirmation* on such day, may be confirmed by the Mayor of such Municipal Council and two Justices of the Peace, not being Municipal Councillors, and in case of a vacancy in the office of Mayor, by any three Justices of the Peace, and it is provided that these may refuse to confirm, and therefore it may be fully implied that the Council cannot refuse.

If the Council can reject, they can only do so by deciding on the merits of each application separately, and with due deliberation, and when they have objections to the person applying, &c. ; and the power of rejecting cannot be legally exercised in any other way.

The Council are not invested with the legislative power to say that there shall be no Tavern Licenses in St. Roch Ward, as well might they prevent them from existing throughout the City ; they have no such extensive power.

The very title of the Act in question is to make better provision for granting licenses to keepers of taverns.....and for the more effectual repression of intemperance. The people of St. Roch Ward imagine they can prevent intemperance by refusing to have licensed houses ; the idea is erroneous. Neither the Council nor the people of St. Roch have a right to enforce such a conclusion, even were it wise, it would be presumptuous, opposed as it is to the will of the Legislature.

The Act was intended to increase the revenue, but the act of the Council tends directly to obstruct and prevent that end ; they oppose their wisdom to that of the Legislature.

The Council had the power to delegate a portion of their authority as to the examination of the applications to a Select Committee, (1) they have done so in this instance. The Police Committee has reported favorably thereon after deliberation.

DUVAL J. : It is therefore evident that deliberation was had on Lawlor's application.

Ross : Yes, by the Committee, and they reported favorably, but no deliberation was had by the Council which rejected the application.

Where an inferior body attempts to defeat the law, and deprive a man of his rights, the Court will compel that body to act justly and legally. (2)

(1) 45 Com. L. R. p. 162.

(2) 2 Harr. Dig. p. 3822. (1 Maule & Sel. p. 697. King vs. Caermarthen.)

If the Council have the power to reject the application, they are bound to assign their reasons therefor, in order that the superintending authority may ascertain whether a reasonable discretion has been exercised. (1)

Where inferior bodies exercise an illegal jurisdiction, or exercise it improperly, the Court will interfere. (2)

The only remedy is by a Writ of Mandamus. (3)

The Court may compel enquiry, though not approval. (4)

The Court is invested with general powers to issue the Mandamus. (5)

The Corporation possess no arbitrary power to refuse uncontrolled by this Court.

STUART, ANDREW, in support of the Petition :—The point to be decided is simple. The Petitioner complains of the refusal of the Council to perform a duty imposed upon them by law ; therefore, he has a right to a Mandamus. The Council do not deny that no deliberation was had upon Lawlor's application, and here we might rest our case, as it is clear Lawlor is entitled to the Writ. Apart from the point of law, the question really at issue involves considerations of metaphysics of the highest order. Every man has, by the natural law, the right of buying and selling what he pleases, and the sale of spirituous liquors forms no exception. As society nevertheless found that the sale of this commodity was liable to abuse, it was deemed judicious to enact that, while the natural right should be limited, licenses should be

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(1) Dowl & Ry. p. 148, *King vs. Hastings*. (5 Barn. & Ald. p. 692, note.) :—Grant on Corp. p. 387—note b.

(2) Grant on Corp. p. 226—note u.

(3) Grant on Corp. p. 252—note r.

(4) Tapping. on Mand. p. 13.

(5) 8 Mod. Rep. p. 149, *King vs. Cambridge* :—1 Lev. p. 119, *Edhuk vs. City of London* :—Styles p. 443.

given for the vending of these liquors, under the public authority, by which also provision could be made for the prevention of the abuse complained of. Prohibitory Acts are impossible of execution, and it has been so found in those states where the traffic of spirituous liquors has been abolished by the Legislature. Not all the coercive measures of the St. Roch people will prevent the exercise of this branch of business in an illicit manner. The sole means of preventing the existence of houses of a doubtful character is to allow certain parties to be licensed to retail liquors, and subject them to the control of the Corporation, and to domiciliary visits from the proper authorities. The refusal to grant licenses will increase the number of unlicensed grog shops, whose occupants will exercise the natural right to sell, to the great diminution of the general revenue.

The power of doing an act does not involve the right to do it. A judge and a jury have the power, if they choose to exercise it, of giving a wrong judgment, or finding a wrong verdict, but properly speaking they have no right to do so. The Council may have the power to reject the application, but may commit a wrong in rejecting it, and thereby subject the petitioner to injustice. They may have the power, but they have not the right to refuse.

The petition from the people of St. Roch was illegal in its tenor and object; not only was it subversive of the provisions of the Statute, in asking that the applications should be rejected simultaneously, but also because it asked of the Council to violate the law without reason. The Council could not refuse to confirm the application without just cause.

It is manifest that from the fact of all the applications from St. Roch having been disposed of together, it is quite possible that, although there was a majority of the Council in favor of refusing all the applications *en masse*, (1) yet a majority

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(1) As each Councillor may have had objections to one individual.



might have been in favor of each separate application. This is exemplified in the case to be found in the 9th Vol. of Toullier, in which a will was submitted to the consideration of four Judges. Each Judge objected to the legality of a portion of the will, which was held by the others to be quite legal, while the other portions which each Judge considered legal was disputed by some one or other of them ; so that although there were four points in the will objected to, yet there was a majority in favor of the legality of every one of the four, each Judge, having one point to which he objected, was nevertheless placed in the minority by finding the other three Judges unanimously against him on that point, and yet each differing in his own point from the other.

If the Council have the power to reject, they have no right to do so without assigning a true and just cause. The licenses are granted by the Revenue Inspector, the Council have merely to see that the requirements of law have been complied with.

LÉGARÉ, against the application : The Council are invested by the 5th & 6th clauses of the above cited Act with the discretionary power of confirming or rejecting the certificate ; by the 5th clause, the power to confirm after due deliberation is given, and that implies that they have also the power to refuse after due deliberation ; I am prepared to show that due deliberation was had upon it ; the present applicant complains that it has been referred to a committee instead of being deliberated upon by the Council, but I am prepared to show by two affidavits which I will now produce, that after the report of the committee was laid on the Council table, due deliberation was had on it, and a division of the Council, as appears by the minutes of the proceedings, took place upon it. Then, having shewn that the Council have deliberated upon it, I maintain that the Court cannot interfere, and I refer the Court to Angel and Ames, p.

656, to show that where a Corporation or Body is invested with a discretionary power, the Court cannot interfere to compel it to exercise its discretionary power, but to control it in its exercise of that power, or compel it to give a decision either one way or another. If it were the intention of the Legislature to invest the Council merely with the power of checking the certificate, it would have caused the certificate to be laid before the City Clerk for that purpose, and not before the Council, as the City Clerk is the person who has charge of the Books, and could tell immediately whether a person were a Municipal elector or not.

The affidavit upon which the present application is founded is not sufficiently clear or intelligible to authorize the issuing of the Mandamus ; there is nothing positively sworn to in it, and nothing that could render the Deponent indictable for perjury ; I refer the Court to Angel and Ames, to shew that an affidavit must be in positive terms and in intelligible language, so that if any thing were sworn to in the affidavit contrary to the fact, the Deponent would be indictable for perjury.

**TESSIER, U. J.** against the application :—If the Council are not invested with a discretionary, but merely with a ministerial power, the result of the Act for the repression of intemperance would be, that every person who demanded a license could compel the Council to give it, and intemperance instead of being repressed as the Act intended, would be most egregiously encouraged. But I maintain the Council have a right to refuse, and that even the Mayor and two justices, or any three justices, have the same power ; The three points the present Applicant demands are : 1st, that the Council be compelled to deliberate. 2nd, That they be compelled to grant or refuse ; and 3rd, that they be compelled to assign their reasons for their decision. The first falls to the ground, inasmuch as it has been shewn that the Council did deli-

berate ; as to the second, the Council have the right to refuse, this right is given to them by the 5th and 6th clauses of the Act cited ; the language of the 5th clause giving the Council the power to confirm, is not imperative ; if it were imperative, no Municipal elector would have the power of refusing to sign the Certificate of any individual, no matter how profligate his character ; it is perfectly clear this is not the intention of the Act ; the 6th clause clearly gives the discretionary power to grant, or refuse. I refer the Court to Angel and Ames, p. 652, Cap. 20, sec. 4, to shew that a Mandamus can issue to compel a Body to exercise its power but not to control it ; and to shew that the application for a Mandamus must shew a specific and absolute right ; I also refer to the same work, pp. 10, 14 and 17, to shew the general powers of Corporations ; and that they exercise a certain power like local republics and governments. If the Council are obliged to assign their reasons in the exercise of their discretionary power, it must be shewn that some specific law requires them to do so, for I am unaware of the existence of any law which requires them to assign their reasons. The Court has to assign its reasons for its decisions ; but this duty is imposed upon it by the law establishing the Court ; but no law exists, that requires the City Council to assign their reason for granting or refusing a certificate for license : the evils which the learned advocates on the other side predict will result from the refusal of the Council to grant licenses, will not occur ; in Boston, no licenses are granted, and no such evils follow from it. If the Council have not the right to refuse, the greatest injuries will be entailed upon the community. it is a well known circumstance, that several persons who kept houses of ill-fame, have presented certificates, duly signed by the 50 electors, and if the Council have not the right to refuse, it will be impossible to repress intemperance.

MEREDITH, J. : The chief question that we have to determine in this case is, as to whether the City Council of Quebec have a discretionary power, as to the confirming or refusing to confirm certificates for Tavern Licenses ; and after having given to this important question due consideration, I am of opinion that under the 5th and 6th sections of the Statute 14 & 15 Vic. cap. 100, the City Council are invested with a discretionary power in this matter ; and, that in the exercise of the discretionary power so vested in them, they are not liable to be controlled by the Superior Court, or the Judges of this Court in vacation.

In support of this opinion, I would advert particularly to the concluding part of the 6th section, in which we find these words, “ and such Council *may refuse to confirm any such certificate, if they see fit so to do.*”

The Legislature have not said, that the Council may refuse to confirm any such certificate, if the signatures to it be counterfeit ; or, if the parties who gave it were not qualified so to do ; or, if the facts certified be untrue.

The words of the law are, that such Council “*may refuse to confirm any such certificate, if they see fit so to do.*”

It would, I think, have been difficult to select more suitable terms for the granting of a discretionary power than those which I have just quoted ; and it is a well established rule of law, that where a discretionary power is granted to a Corporation or its Officers, the Courts of Justice will not control them in the exercise of that power. (1)

The reasonableness of this rule is illustrated by the present case. The members of the City Council are sworn to discharge their duty according to “*the best of their judgment*”

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(1) See Angel and Ames, p. 581, and the cases there cited.

*and ability,"* and give their votes in Council under their oath of office. A majority of the Council have, by their votes, given under oath, declared in effect, that they see fit to refuse to confirm the certificate. That certificate cannot now be confirmed, unless a majority of the same Council, by their votes, under oath, as already mentioned, declare *that they see fit to do that* which they have already declared *they see fit not to do*. It is quite possible, perhaps even probable, that some of the Members of the Council may, upon further consideration, change their opinion as to the propriety of attempting, in the execution of the present law, to suppress all Taverns in the parish of St. Roch; but the issuing of a Writ of Mandamus for the purpose of compelling them to do so, would manifestly be most unreasonable. If the question which has been submitted to the Council could be submitted to us, we, in the exercise of our judgment, might deem it to be our duty to say, that we see fit to confirm the certificate of the applicant; but it does not therefore follow that we ought to attempt to compel the City Council, in the exercise of their judgment, and upon their oath, to say that they see fit to confirm a certificate which, according to their judgment, ought not to be confirmed.

In order to shew to what extent a public functionary, invested with a discretionary power, is free from control in the exercise of that power, I will refer to the ruling of the Judges in England in cases in which the Commissioners for Bankrupts had refused to sign the bankrupt's certificate, and read the following passage from Lord Henley's Digest of the Bankrupt Law, p. 399:—"The *discretion* of the Commissioners in refusing their signatures to the Bankrupt's certificate, was most elaborately discussed in the case *Ex parte, King*, 7 Vesey 417, by Lord Eldon, in which, and upon subsequent applications by the same bankrupt, (13 Vesey, 181; 15 Vesey, 126,) it was determined, in ac-

cordance with previous *dicta*, that the judgment of the Commissioners is not liable to the control of the Lord Chancellor; that they cannot honestly refuse their signatures unless, under the sanction of the oath which they have taken, they are satisfied that they ought not to sign; that the Lord Chancellor may recommend them to review their judgment; but having reviewed all the circumstances of the case, he cannot, either by order or intimation, tell them, having taken that oath, that they are to act in any manner that is not consistent with their own conscientious judgment. The petitioner in this case afterwards applied to the Court of King's Bench for a Mandamus to the Commissioners to certify, which was refused." I will also refer to Deacon on Bankruptcy; vol. 1, p. 573, and to Greenleaf on Ev., Nos. 73 and 431. (2)

Having expressed my opinion upon the principal questions in this cause, namely, as to the discretionary power of the Council, and as to our authority to control them in the exercise of that power, I shall now attend to the objections which were urged against the form of proceeding adopted by the Council, when they determined upon the application in question. It was contended, that at least there ought to have been due deliberation on the part of the Council before they refused to confirm the certificate of the applicant; and that there could not have been such deliberation on each certificate, as all the applications from persons resident in the St. Roch Ward were rejected collectively. In answer to this objection, I would observe that it was not illegal to vote at one and the same time upon all the applications which were liable to the same objection; that objection being, of itself, deemed insuperable by a majority of the members of the Council. Had each application from St. Roch been determined by a separate vote, the result would

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(2) Tapping on Mandamus, p. 13.

4 Ad. and El. p. 297, (Judgment of Williams J.) Selwyn's Nisi Prius, p. 1104.

1 Maule and Selwyn, 195.

doubtless have been the same ; and upon a mere matter of form we ought not to attempt to dictate to the Council.

For these reasons, I am of opinion that the Writ of Mandamus prayed for must be refused.

DUVAL, J :—The application for a Mandamus is made to the judges of the Superior Court, as the peculiar Superintendent of all inferior jurisdictions and authorities, to compel the performance of a public duty imposed upon the Mayor and Councillors of the City of Quebec, by a provincial statute.

It must be borne in mind that we do not sit as a Court of appellate jurisdiction, to revise the decision of the Mayor and Councillors, and bound to set aside that decision, should it not coincide with our own views on the subject—with the *bien jugée* we have nothing to do—at present, it is altogether a question of jurisdiction—are the Mayor and Councillors invested by law with a discretionary power in the matter, and, if they are, have we any right to interfere, and to control them in the exercise of that discretionary power ?

The authority of the Mayor and Councillors is given to them by the 14th and 15th Vict. Ch. 100, secs. 5 and 6. But before adverting more particularly to the power conferred by this statute, it is proper to see what power was previously vested, both in England and in Lower Canada, in Justices of the Peace to whom application for Tavern licenses were made.

In a case referred to in *Petersdorff vbo. Mandamus*, p. 471, the following was the language used in pronouncing the judgment of the Court. "It has been truly said, that the power of licensing public houses is so absolutely in the discretion of the Justices of the Peace, that the Court will never award a Mandamus for the licensing of a public house." In the 1st Vol. of Dickinson, Justice of the Peace, p. 26, a

work certainly of authority on such a question as the present, we find reported the words used by Lord Mansfield : " This Court has no power or claim to review the reasons of Justices of the Peace, upon which they form their judgments in granting licenses, by way of appeal from them, or overruling the discretion intrusted to them." In Archbold's practice of the Crown office, it is laid down as a general rule, that, where a discretionary power is given to Justices by statute, the Court of Queen's Bench will not interfere by Mandamus to oblige them to exercise that discretion in any particular way, or to review the manner in which they have exercised it. In a comparatively late case, 14 East, 397, Lord Ellenborough, in granting a Mandamus, said : " We do not, however, by granting the Writ, at all interfere with the exercise of that discretion which the Legislature meant to confide to the Justices in Sessions ; we only say that they have a discretion to exercise, and that they must hear the application ; but, having heard it, it rests entirely with them to act upon it as they think fit." It is needless to refer to other decisions—the latest will be found to confirm the principle above laid down. In this Country, the late Chief Justice Sewell, presiding in the Court of King's Bench for the District of Quebec, acted on the same principle of law, and refused to interfere by Mandamus.

Now, we are to inquire if the same discretionary power is vested in the Mayor and Councillors ? It would, indeed, be strange to find the Legislature refusing to this body properly called a " local legislature," that discretionary power in the arrangement of its local affairs, which has always before been granted to Magistrates appointed by the Crown. There is, however, no room for doubt ; for the 6th clause of the 14 & 15 Vict. c. 100, gives the power in express terms. In my opinion, the 5th clause, rightly interpreted, is equally conclusive on this point. The legislative power of the Cor-



poration over this subject has been delegated to it for the good of the City ; if that power is not exercised with sound discretion, the remedy must be found in the exercise of the elective franchise of the citizens.

In the present instance, we find the Corporation had appointed a Committee to report on the subject—the Committee made a report ; a number of citizens presented a petition, and then the whole was taken into consideration, when it was decided that no Tavern License ought to be granted for a particular ward : as the petitioners wished to keep no tavern in this ward, the Council had not to inquire into the particular fitness or qualification of the Applicant as a tavern-keeper ; he was told there would be no tavern allowed in the ward.

It has been argued that if the Mayor and Councillors have the power to reject a certificate for a Tavern License in any one ward of the City, they have a right to prevent any tavern being opened in the City. The latter, in my opinion, is not a necessary consequence. But as, in this case, the question does not arise, I pronounce no opinion. When such a power is exercised, it will be the duty of the Judges to determine whether the power has or has not been granted, and to take care that no municipal body legislates for any part of this District, under the specious pretext of carrying into execution a law of the land.

Before I close my observations, I will advert to a very strange notion entertained by some persons, and that is, that the party making the application is entitled to the Writ at this stage of the proceedings, whatever may be our opinion hereafter. This opinion is without any foundation in law. In England, the Court, in the first instance, grants a Rule, calling upon the party to shew cause why a Mandamus should not issue. If the party thus called upon, can shew good cause, it is needless to say, the Writ is refused (1) ; even

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(1) Tapping on Mandamus, p 15.

on an application for a Habeas Corpus, when the subject has been deprived of his liberty, the Writ is refused, if the Judge is of opinion that the party applying ought not to be discharged from custody or admitted to bail. Our own Provincial Statute, 12 V. c. 41, does not make it imperative on the Judge to order the Writ to issue in the first instance.

We must therefore refuse the Writ. But I wish it to be distinctly understood, that our decision is confined to the case now before us, in which, in the exercise of a discretionary power, the Mayor and Councillors have decided there ought to be no Tavern in a particular part of the City. We pronounce no opinion on the right of the Mayor and Councillors to decide that there shall be no Tavern within the limits of the City, nor are we called upon to express any opinion on the wisdom or expediency of the resolution adopted by the Council.

The Judges, &c. :—The said Judges considering that, by law, the Mayor and Councillors of the City of Quebec are invested with the power of confirming or rejecting, as in their discretion they may deem fit, certificates obtained for the purpose of procuring a license to keep a house of public entertainment; and considering further that the Judges of the Superior Court have no power to review the reasons upon which the Mayor and Councillors have formed their judgment in granting or rejecting any such certificate, and cannot control the said Mayor and Councillors in the exercise of the discretionary power vested in them by law to this effect, do reject the application of the said Patrick Lawlor for a Writ of Mandamus.

ROSS, DUNBAR, for Petitioner.

STUART, A., Counsel.

LÉGARÉ, for Mayor and Councillors.

TESSIER, Counsel.

## COUR SUPERIEURE.—QUEBEC.

Présents : BOWEN, Juge-en-Chef, et DUVAL, Juge.

No. 322 } *Ex parte* :—  
 de  
 1852. }

GUAY ;  
*Requérant pour Certiorari.*

Jugé, que le décret canonique de Sa Grâce l'Archevêque de Québec, érigeant une paroisse, n'est pas une procédure civile qui puisse être révisée par la Cour Supérieure au moyen d'un Writ de *Certiorari* : Que ce n'est qu'une procédure purement ecclésiastique, hors de la juridiction de cette Cour, tant qu'il n'y a point de procédures pour obtenir la ratification civile de tel décret.

Held, that the ecclesiastical decree of His Grace the Archbishop of Québec, for the erection of a parish, is not a civil proceeding subject to the revision of the Superior Court by means of a Writ of *Certiorari* : That such proceeding is purely ecclesiastical, without the jurisdiction of the Superior Court, so long as no proceedings are had for the purpose of obtaining a ratification of such decree by the civil authorities.

Jugement rendu le 7 Avril, 1852.

Sa Grâce, l'Archevêque Catholique de Québec, sur requête de certains francs-tenanciers de la paroisse de la Pointe Lévy, avait, par décret canonique, en date du 3 Novembre, 1851, ordonné le démembrement de cette paroisse, et la formation d'une nouvelle division sous l'invocation de Notre Dame de la Victoire, nonobstant l'opposition d'une autre partie des dits francs-tenanciers. Ces derniers, se croyant lésés par ce décret canonique, s'adressèrent, par l'entremise du requérant, F. M. Guay, à la Cour Supérieure pour demander l'émanation d'un *Writ de Certiorari*, enjoignant à Sa Grâce, l'Archevêque Catholique de Québec, de transmettre devant la dite Cour le décret canonique, ainsi que tous les ordres et mandements, faits et donnés par Sa Grâce, et aussi les requêtes, contre-requêtes, et oppositions ayant rapport à la subdivision de la paroisse St. Joseph de la Pointe Lévy, et à la formation et érection d'une nouvelle

paroisse, sous le nom de Notre Dame de la Victoire. Les opposants par leur contre-requête avaient allégué :

1. Que la minorité des francs-tenanciers de la paroisse de la Pointe Lévy avait demandé ce démembrement, et que la majorité s'y était opposée par contre-requête à Sa Grâce.

2. Que le lieu choisi pour la nouvelle église n'était pas central.

3. Que la paroisse de St. Joseph de la Pointe Levy était alors endettée de £400.

4. Que la requête, demandant le démembrement, portait au delà de 80 signatures de personnes non francs-tenanciers.

5. Que la requête, demandant le démembrement, (les signatures illégales rejetées,) ne portait que 275 signatures, tandis que la contre-requête en comptait 450.

Faisant droit sur les prétentions respectives des parties, Sa Grâce, l'Archevêque Catholique de Québec, le 13 Novembre, 1851, rendit son décret canonique d'érection, dont suivent les considérants :

Considérant; 1. " Qu'il ne serait pas juste que la majorité des francs-tenanciers d'une paroisse, par la raison seule qu'elle est la majorité, eût le droit d'empêcher le démembrement de telle paroisse, surtout quand tel démembrement est réclamé par une impérieuse nécessité.

2. " Qu'à la vérité le nombre des francs-tenanciers de la dite paroisse de St. Joseph de la Pointe Levy qui s'opposent à l'érection de la paroisse demandée, étant de 423, et plus grand de 67 que celui des francs-tenanciers de la dite paroisse de St. Joseph de la Pointe Levy qui, au nombre de 356, ont demandé la dite érection, mais que, dans les limites de la paroisse demandée, les francs-tenanciers, au

nombre ci-dessus cité de 356 qui ont demandé la dite érection, ont sur ceux qui s'y opposent une majorité de 197, laquelle majorité est formée de gens qui doivent être considérés comme étant plus directement intéressés dans la dite érection.

3. " Que s'il est admis que l'Eglise maintenant en construction dans la paroisse demandée ne se trouve pas dans le vrai centre de la dite paroisse, elle est néanmoins placée à l'endroit considéré comme le plus à la convenance de la majorité de la population appelée à la fréquenter, non seulement pour le présent, mais encore et surtout pour l'avenir, ainsi que l'avait compris l'autorité ecclésiastique, lorsqu'elle décida que la dite Eglise serait construite sur l'emplacement où elle vient d'être élevée.

4. " Que ce qui restera de la dite paroisse de St. Joseph de la Pointe Lévy sera à la vérité de peu d'étendue, du moins en front, si elle est démembrée ainsi qu'on le demande ; mais que la dite paroisse ne laissera pas que d'avoir une population plus que suffisante pour occuper un prêtre ; que cette population qui, depuis quelques années, s'est grandement augmentée par l'affluence d'étrangers attirés par le commerce de bois qui s'y fait sur une grande échelle, ne peut que s'accroître encore rapidement dans un temps peu éloigné ; que, malgré son peu d'étendue, la dite paroisse n'en sera pas moins capable de procurer une existence honorable à son curé, attendu que celui-ci aura, outre sa dîme, la jouissance d'une terre, dont la concession d'une partie comparativement très-minime lui assure déjà une rente annuelle de cent livres courant, ce qui le mettra dans une condition plus favorable que les prêtres qui seront chargés du soin de la nouvelle paroisse, qui, avec une population de plus du double, n'auront cependant de ressource certaine que dans la dîme.

5. " Que la dite paroisse de St. Joseph de la Pointe Lévy n'est point endettée pour la construction de l'Eglise paroissiale

et du Presbytère du lieu, ainsi que la dite opposition veut l'insinuer, mais que la Fabrique de la dite paroisse reste seule responsable des dettes contractées pour la construction des dits édifices, sans que l'on puisse forcer en aucune manière les paroissiens à se taxer pour le paiement des dites dettes ; qu'il est d'ailleurs prouvé que les sommes dues à la dite Fabrique au 1er Octobre, 1851, et qui ne tarderont pas à être recouvrées, sont plus que suffisantes pour acquitter les dites dettes dont le montant n'excède pas la somme de £400 courant.

“ En conséquence, nous avons démembré et démembrons de la dite paroisse de St. Joseph de la Pointe Lévy, &c., &c.”

Les griefs du Requéran, quant à ce décret, étaient :

1. “ Que les Opposants n'avaient pas été admis à prouver les allégués de leur contre-requête.”

2. “ Que Sa Grâce s'en était rapporté uniquement au procès-verbal de son subdélégué.”

3. “ Que, nonobstant, la majorité se trouvait encore du côté des Opposants, ainsi que constaté par le dit décret.”

4. “ Que la fabrique était endettée au delà de £400 courant.”

C'est appuyé de ces griefs, que le Requéran demandait à la Cour Supérieure un Writ de *Certiorari*, afin d'y plaider l'illégalité, (*prétendue*), du décret canonique en question.

Sur cette demande, qui fut opposée de la part de Sa Grâce l'Archevêque, et des intéressés à la formation de la nouvelle paroisse, la question débattue fut de savoir si la procédure de l'autorité ecclésiastique, procédant à l'érection canonique d'une paroisse, n'était pas une procédure purement ecclésiastique et non civile, et par conséquent en dehors

de la juridiction des tribunaux civils, ou si au contraire ce n'était pas l'exercice d'un pouvoir *quasi* judiciaire, sujet à la révision de la Cour Supérieure, au moyen du Writ de *Certiorari*.

CHABOT, pour Sa Grâce, L'Archevêque, dit : L'érection canonique d'une paroisse ou cure est purement ecclésiastique. L'évêque seul a droit d'ériger des cures. C'était le droit de la France avant 1663 (1). Mais pour donner l'effet civil à l'érection canonique d'une paroisse, il fallait le consentement du Souverain. Jusqu'à l'Edit des Mains-Mortes (1749), ce consentement tacite du Souverain suffisait, mais depuis il fallait des patentes. En Canada, on a suivi ce qui se pratiquait en France. L'évêque a toujours, depuis la première enfance de la colonie, exercé le droit d'ériger des paroisses. L'arrêt du Roi de France du 3 Mars, 1722, (2) n'érige pas les paroisses, mais les suppose existantes, et ne fait que définir les limites d'icelles. L'évêque seul avait érigé ces paroisses et cures, et elles étaient reconnues par le gouvernement. Ainsi, dans les lettres patentes de Juin, 1702, (3) portant confirmation de l'union de la cure de Villermarie et de celles de l'Isle de Montréal et de la Côte de St. Sulpice au Séminaire de Montréal, le Roi reconnaît que l'évêque de Québec avait érigé en cure et uni au dit Séminaire l'église paroissiale du dit lieu, et que l'évêque avait uni au dit Séminaire quatre autres cures, et le Roi confirme cette union. l'édit de Mai, 1679, (4) et l'arrêt du 12 Juillet, 1707, (5) au sujet des dîmes, parlent des curés et supposent des cures existantes. Dès 1675, le Conseil Supérieur de Québec, qui avait les pouvoirs d'un parlement, par arrêt du 18 Mars, (6)

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(1) Héricourt, p. 634 :—4 Code des Curés, pp. 447, 474 et 475 :—Ordonnance d'Orléans :—Ordonnance de Blois :—Edit de Melun.

(2) 1 Ed. Ord. p. 403.

(3) 1 Ed. Ord. p. 304.

(4) 1 Ed. Ord. p. 243.

(5) 1 Ed. Ord. p. 314.

(6) 2 Ed. Ord. p. 143.

condamne les marguilliers de l'église paroissiale de Québec à rendre certains honneurs aux officiers du gouvernement ; et le 22 du même mois (1) le dit arrêt est étendu à toutes les autres paroisses du pays. Le 18 Novembre, 1705, Arrêt du même Conseil Supérieur contre les curés de l'Ange Gardien et Beauport, leur faisant défense, et à tous les autres curés du pays, d'exiger plus que le 26<sup>e</sup> minot de tous grains pour dîmes. (2) L'arrêt du même Conseil de 1709 au sujet des honneurs des seigneurs dans les Eglises (3) reconnaît l'existence de paroisses. L'on trouve encore un grand nombre de jugements et ordonnances des Intendants pour la construction et réparation des églises, presbytères et sacristies avant 1722. Ce qui fait voir évidemment, que les paroisses et cures érigées par l'évêque seul étaient reconnues par le Gouvernement, de la même manière qu'elles étaient reconnues en France avant l'Edit des mains mortes.

Depuis la cession du pays à l'Angleterre, l'évêque a continué à ériger seul les cures et paroisses en Canada. Cette érection est valide pour toutes les fins ecclésiastiques, et l'autorité civile n'intervient que quand on veut donner à ces paroisses et cures les effets civils ; le droit de l'évêque est reconnu par l'Ordonnance du Gouverneur et Conseil, 31<sup>ème</sup> Geo. III, Ch. 6, en statuant que quand il sera expédient de former des paroisses, la même forme de procédés usitée avant 1760 sera suivie, et que l'évêque ou surintendant des Eglises Romaines aura et recevra les droits de l'évêque du Canada, avant la même époque (1760.) L'évêque a donc continué depuis 1760 à ériger des paroisses comme il le faisait avant. La Législature du Bas Canada a reconnu ce pouvoir de l'évêque d'ériger des paroisses et cures, puisque par le statut de la 1<sup>ère</sup> Guill. IV, Ch. 51, elle déclare que les autorités ecclésiastiques seules ont érigé des paroisses depuis l'arrêt de 1722, et elle pourvoit à la nomination de commis-

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(1) 2 Ed. et Ord. p. 145.

(2) 2 Ed. et Ord. p. 182.

(3) 2 Ed. et Ord. p. 182.



saires, non pour ériger de nouveau ces paroisses, mais seulement pour en constater les limites pour les fins et effets civils. Ce pouvoir de l'évêque d'ériger des cures est encore reconnu par l'ordonnance du Conseil Spécial, 2 Vict. C. 29, (actuellement en force) qui déclare que dans l'érection des paroisses il sera procédé par les autorités ecclésiastiques (les évêques) suivant les lois ecclésiastiques et les usages du Diocèse jusqu'au décret définitif d'érection canonique, et ensuite pourvoit à la manière de faire reconnaître ce décret canonique pour les effets civils. Dans le cas actuel, l'Archevêque de Québec a émané son décret canonique érigeant une nouvelle paroisse. Ce procédé est purement ecclésiastique, et cette cour ne peut intervenir. Si les *intéressés* demandent la confirmation de ce décret canonique pour lui donner les effets civils, comme la loi le leur permet, alors, et *alors seulement*, les autorités civiles pourront intervenir, non pas cette cour, mais le tribunal des commissaires nommés en vertu de l'ordonnance du Conseil Spécial.

Le Requéran en cette cause doit être débouté de son application, vu que le décret canonique dont il se plaint est purement ecclésiastique. D'ailleurs, le Requéran qui demande un Writ de *Certiorari* ne fait pas voir qu'il ait été privé d'aucuns droits civils ou qu'il ait été condamné à payer quelque chose ; en un mot, il ne fait pas voir que dans l'émanation du décret canonique de l'Archevêque il y a quelque procédé ou chose judiciaire, ce qui est nécessaire pour obtenir ce Writ (1).

LEMIEUX, plaida pour les paroissiens demandant la nouvelle paroisse.

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(1) 5 Petersdorff, pp. 149-150 :—1 Deacon's Crim. Law, p. 208.

Le jugement est motivé comme suit :

.....“ Considérant qu’aucunes procédures n’ont été prises, suivant la loi, pour la ratification civile du décret canonique de Sa Grâce l’Archevêque Catholique de Québec, la Cour refuse le Writ de *Certiorari*.”

BOSSÉ, pour Guay.

CHABOT et DELAGRAVE, pour l’Archevêque.

GAUTHIER et LEMIEUX, pour les paroissiens.

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SUPERIOR COURT.—QUEBEC.

Before BOWEN, Chief Justice, and DUVAL, Justice.

No. 201 { GERMAIN,..... *Appellant*.  
of { and  
1852. { VEZINA,..... *Respondent*.

The omission by an Appellant to annex copy of an appeal bond, certified by the officer in whose custody it is kept of record, to his original petition in appeal, in compliance with the provisions of the 12th Vic. Cap. 38, Sec. 55, is fatal. The Court will not permit such Appellant to supply the deficiency by filing a copy of the bail bond.

L’Omission par un Appellant d’annexer copie du cautionnement en appel, certifié par l’officier en la garde duquel il est demeuré, à la requête originale en appel, en conformité aux dispositions de la 12 Vic, cap. 38, sec. 55, est fatale. La cour ne permettra pas que l’Appellant en pareil cas supplée telle omission en produisant une copie du cautionnement.

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Judgment rendered the 1st of March, 1852.

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This was an appeal from the Circuit Court of the Portneuf Circuit. The bail bond given by the Appellant was so given before a Judge of the Superior Court. The petition in appeal was filed by the Appellant without any copy of the bail bond certified by the Prothonotary in whose office it had been deposited being annexed thereto. Upon the petition being so filed, the Respondent moved “ that all right and claim of

the said Appellant founded upon the appeal in this cause instituted, be declared forfeited, and thereupon the said appeal hence dismissed &c., &c. Because no true copy or other copy whatsoever of the appeal bond given by the said Appellant, certified as such by the Prothonotary of this Court, in whose office it hath or ought to have been deposited, or certified by any person whatsoever, was or hath ever been annexed to the original petition in appeal presented to this Honorable Court and in this cause filed."

At the hearing upon this motion, the Judicature Act 12th Vic. Cap. 38, Sec. 55, was referred to by the Respondent, and it was contended that the omission by the Appellant to annex a copy of the appeal bond to his original petition in appeal, in compliance with the terms of the concluding proviso of the section referred to, was fatal to his right of appeal.

It was urged by the Appellant that the bail bond having been given before a Judge of the Superior Court, and deposited with the Prothonotary of that Court, the original bond in appeal formed part of the record, and that the omission on the part of the Appellant to annex copy of the appeal bond could not be fatal to his rights, He offered to supply the deficiency and to furnish the requisite copy, and moved the Court to that effect.

DUVAL, Justice :—The proviso in the 55th sec. of the 12th Victoriæ is imperative upon Appellants to this Court from Judgments rendered in the Circuit Court for Lower Canada. The original appeal bond forms no part of the record in this cause, by the 54th section of the Act above referred to, which constitutes and gives jurisdiction to this Court, it is provided : " That the party appealing from any judgment rendered as aforesaid by the Circuit Court, shall within fifteen days from the rendering of the judgment appealed from, give good and

sufficient security to the satisfaction of the person before whom it shall be given, that he will effectually prosecute the said appeal and answer the condemnation; and such security shall be given either before any Judge of the Superior Court, or the Prothonotary thereof, and the bond shall then be deposited and remain of record in the office of the latter, or it shall be given before any Circuit Judge, when at the place where the judgment appealed from shall have been rendered, or before the Clerk of the Circuit Court at such place, and the Bond shall then be deposited and remain of record in the office of the latter." If, in the present case, the bond in appeal had been given before a Circuit Judge, or before the Clerk of the Circuit Court, where the judgment has been rendered, it is manifest that the bond would not be before this Court, but would have remained deposited in the office of that Clerk, as it is deposited in the office of the Prothonotary of this Court, and no copy of the bail bond having been annexed to the original petition, neither the Court nor the party respondent have any means of testing the validity of the security given. Indeed this Court has no evidence in the record to show that any bail bond or security has been given at all.

The omission is fatal, and the Appellant must be declared to have forfeited all right founded upon his Appeal. We cannot permit him to supply the deficiency, and his application to file a copy of the bail bond must be discharged, the late Court of Queen's Bench has refused similar applications.

(1)

The Judgment is as follows :

The Court, etc., having heard the parties upon the motion of the said Louis Vézina the Respondent, that all right and claim of the said Appellant, founded upon the appeal in this

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(1) Joseph, Appellant, and Carrier, Respondent—Queen's Bench—Quebec, No. 991 of 1849.

cause instituted be declared forfeited, and the said appeal dismissed with costs to the Respondent, and the record remitted to the Court below, etc., seeing that a true copy of the appeal bond given by the above named Appellant, Prime Germain, hath not been annexed to the Petition presented by the said Prime Germain to this Court, praying for the reversal of the Judgment appealed from, it is hereby ordered and adjudged that the said Prime Germain hath forfeited all right and claim founded on the said appeal, and that the said appeal be hence dismissed with costs, &c., &c.

TESSIER, for Appellant,

LELIEVRE & ANGERS, for Respondent.

### COUR SUPERIEURE.—QUEBEC.

Présents : BOWEN, Juge-en-Chef DUVAL et MEREDITH, Juges.

|         |   |                                 |
|---------|---|---------------------------------|
| No. 720 | { | REGINA <i>ex relatione</i> .    |
| de      |   | MORISSET                        |
| 1851.   |   | vs.                             |
|         |   | CARRIER..... <i>Defendeur</i> . |

|                                                                                                                                                                                                                               |                                                                                                                                                                                                                     |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>Le Défendeur, dans le cas d'un Writ de Certiorari, ne peut contraindre le Requéant à procéder sur tel Writ au moyen d'une simple motion à cet effet, il faut procéder en pareil cas par le moyen du <i>procedendo</i>.</p> | <p>The Defendant, in the case of a Writ of Certiorari, cannot compel the Petitioner to proceed upon such Writ by a mere motion, the proceedings to be had in such case must be by means of a <i>procedendo</i>.</p> |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

Judgment rendered the 2d April, 1852.

Dans cette cause, il était émané, à la poursuite de Morisset, un Writ de Certiorari, pour soumettre à la révision de la Cour Supérieure pour le Bas-Canada, certaines procédures

d'une Cour de Commissaires ; le Writ émana le 14 Avril, 1851, rapportable le 1er Septembre ensuivant ; en effet, le Writ fut rapporté en Cour, avec la procédure qu'il s'agissait de réviser, le 29 Août. Le 2 Septembre il fut filé une comparution de la part du Défendeur Carrier. Depuis ce jour, 2 Septembre, 1851, jusqu'au 22 Mars, 1852, Morisset ayant négligé de faire aucune procédure dans la cause, Carrier fit motion que Morisset fut tenu, dans tel délai qui serait ordonné, de procéder, sur le Writ de Certiorari émané à sa demande, et que faute par lui d'adopter, dans le dit délai, les procédures nécessaires pour amener à fin la dite cause, le dit Writ de Certiorari, et la procédure sur icelui prise, fussent mis de côté et annulés.

Les parties ayant été entendues sur cette motion, la Cour fut unanimement d'opinion que le Défendeur ne pouvait, par simple motion, contraindre le Requéérant à procéder sur le Writ de Certiorari émané à sa poursuite, et qu'il ne pouvait obtenir le résultat qu'il désirait qu'au moyen d'une motion pour l'émanation d'un *procedendo*.

La motion est renvoyée sans frais.

GAUTHIER et LEMIEUX, pour le Requéérant.

TASCHEREAU J. T., pour le Défendeur.

## SUPERIOR COURT.—MONTREAL.

Before DAY, VANFELSON and MONDELET, Justices.

|         |   |                           |                           |
|---------|---|---------------------------|---------------------------|
| No. 414 | { | LYMAN <i>et al.</i> ..... | <i>Plaintiffs.</i>        |
| of      |   |                           | vs.                       |
| 1852.   |   | PERKINS.....              | <i>Defendant.</i>         |
|         |   | and                       |                           |
|         |   | PERKINS.....              | <i>Intervening Party.</i> |

Held, that where a sum of money, forming part of a larger sum for which the Defendant is sued, has been paid to the Plaintiff during the pendency of the action, such matter cannot be set up in a *demande en intervention*, but that it should be by a supplementary plea. Intervention filed on such grounds dismissed on motion.

Jugé, que le paiement de partie de la dette fait par le Défendeur pendant l'instance, ne peut faire la matière d'une Intervention, mais doit être invoqué par un plaidoyer supplémentaire. Intervention basée sur ce moyen renvoyée sur motion.

Judgment the 27th day of April, 1852.

In this case the Defendant was sued as drawer of a Bill of Exchange for £237 11s 8d. The proof was completed, and the case inscribed on the *rôle de droit* for hearing on the merits on the 1st of April, 1852. On the 20th of the same month, whilst the case was still on the roll for hearing, an Intervention was filed by the Defendant, on the ground that since the inscription, the Plaintiffs had received from the bankrupt estate of William Bradbury, the acceptor of the Bill of Exchange, a portion of the sum of money demanded by the action.

On the 23d of April, the Plaintiffs filed a *retraxit* for £95 15s 7d, and on the 26th of the same month moved to reject the Intervention on grounds connected with irregularities in the service, and mainly upon the ground that the document in question was not an Intervention, but only a paper-writing in the nature of an application to replead.

**DAY** :—This is not matter for an Intervention at all, but for a supplementary plea, what in England is known as a plea of *puis darrein continuance*. The proceeding must be by motion or petition accompanied by an Affidavit alleging newly discovered matter. The motion to dismiss the paper must be granted.

The following is the judgment :

“ Considering that the Defendant hath not in the paper-writing, by him styled “ Intervention,” filed in the said cause, set forth any matters, causes, or things, by reason whereof and by law he can become an Intervening party in the said cause, and that the said paper-writing cannot by law be considered as a *demande en intervention*, doth grant the said motion and reject the said paper-writing styled “ Intervention,” with costs.

**BETHUNE and DUNKIN**, Attorneys for Plaintiffs.

**McKAY and AUSTIN**, Attorneys for Intervening party.

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**SUPERIOR COURT.—MONTREAL.**

Before **DAY**, Justice, and a Special Jury.

Monday the 8th day of March, 1852.

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|                         |   |                                                                                    |
|-------------------------|---|------------------------------------------------------------------------------------|
| No. 2529<br>of<br>1852. | { | <b>MUIR</b> ..... <i>Plaintiff.</i><br>vs.<br><b>PERRY</b> ..... <i>Defendant.</i> |
|-------------------------|---|------------------------------------------------------------------------------------|

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Held, that a party who has effected an improvement in Fire-Engines, by a new combination of old parts, whereby greater results are obtained, is entitled to take out and maintain Letters Patent for his exclusive right.

Jugé que celui qui a fait des améliorations aux Pompes-à-feu par une nouvelle combinaisons des parties qui les composent, de manière à en obtenir des résultats plus avantageux, a droit de prendre et faire maintenir des Lettres Patentes pour s'en assurer le privilège exclusif.

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This was an action for the infringement of a right of Patent, secured under the Provincial Statute, 14 and 15 Vict. ch. 79.



The declaration recited that the Plaintiff was a British subject, and that on the 27th October, 1847, he obtained Letters Patent for a "new and useful improvement in the method of constructing the best plates of end-working Fire Engines, and in the method of placing the supply and delivery valves of such engines." The effect of such improvement being that the working barrel is more easily charged and discharged, and the emission of water from the air vessel rendered more effective and copious. That the Defendant had infringed the said Letters Patent, inasmuch as he "did work, use, exercise, and put in practice the said invention, and divers parts of the said invention," and did "make and manufacture divers end-working Fire Engines, to wit: a first class Fire Engine according to and by means of the said invention"—and did "make an end-working Fire Engine with certain improvements in the construction thereof respectively, which were then and there intended to imitate and resemble, and did imitate and resemble, the said improvement so invented by the Plaintiff,"—and "did make divers end-working Fire Engines, in the construction of which he, the said Defendant, did imitate in part, and did make a certain addition or alteration in the said invention, whereby to pretend himself the inventor thereof," and thereupon prayed that the Defendant might be condemned to pay the Plaintiff the sum of £60, being equal to three times the price for which the Plaintiff had usually sold or licensed, or might have sold or licensed to other persons the use of the said invention.

To this action the Defendant pleaded—1st. The general issue. 2nd. That the pretended invention was not originally discovered by the Plaintiff, but had been in use for fifty years before. 3rd. That the improvement, patented by the Plaintiff, was the device of a committee of the Union Fire Company, composed of the Plaintiff, Defendant, E. Maxwell, and John M'Waters.

To these pleas the Plaintiff replied generally.

The Letters Patent and specifications were put in and read, also the answers of the Defendant to certain interrogatories *sur faits et articles* that had been submitted to him. In these answers the Defendant admitted that he had spoken of the improvement patented by the Plaintiff as Muir's plan—that he had written to parties who had inquired of him the price of Engines : “ if Muir's Patent be added, it will cost £15 more, which he would recommend, as it would work with six or eight men less”—that he had agreed to give the Plaintiff £10 for each of the Engines that he sent to Brockville and St. Catherines,—and that he had built a first class Fire Engine for the World's Exhibition, in the construction of which the improvement patented by the Plaintiff had been used, with some alterations.

The fact of the Plaintiff being a British subject was admitted.

The Plaintiff called a number of witnesses to prove the useful character of his invention, and that an Engine into which it had been introduced had beaten the best Engines in the City; that the parts patented were of the Plaintiff's invention, and were a decided improvement, and that the improvement was worth £20 to any builder of Engines. The result of the improvement was explained to be a diminution of the friction from the alteration of the angles, and from the fact of there being but one angle to pass. No new principle was applied, but the form was altered, so as to produce a better result.

For the defence it was contended that the Plaintiff had not set out, in his declaration, any invention of a description that by law entitled him to obtain Letters Patent, and that the declaration might have been demurred to; that the improvement for which the Plaintiff had obtained a Patent was

not patentable, but was a mere change in form and proportions, the principle being well known before. That, moreover, the Plaintiff had no exclusive right to the pretended invention, which was the device of a committee of the Montreal Union Fire Company, of whom he was one.

Witnesses having been called to support the defence, as also in rebuttal.

DAY, Justice, summing up, observed : In order to support his case the Plaintiff must prove all the facts by him alleged, for they have all been put in issue, and were declared by the articulation of facts suggested by him, and by the order of the Court upon them, to be necessary. These facts are—  
1st. That he has Letters Patent for the alleged invention.  
2nd. That he is the first and true inventor. 3rd. That the invention is useful. 4th. That it has been infringed by the Defendant. 5th. The value of the invention, or, in the words of the statute, the amount for which it might be sold.

Before advertng to the evidence, it is necessary to dispose of a preliminary point raised by the Counsel for the Defendant. He has contended that the Plaintiff has not set out any invention of a description that by law entitles him to obtain Letters Patent. Admitting all he asserts to be true, there can, nevertheless, be no exclusive privilege and no right of action against the Defendant. On this pretension the Court is against the Defendant. The inventions of machinery which may be made the subject matter of Letters Patent may be classed under three heads. 1st. New inventions of entire machines. 2nd. The addition or subtraction of parts in old machines whereby greater results are obtained, or the same results with less expense. 3rd. A new combination of old parts whereby greater results are obtained, or the same results with less expense. The Plaintiff claims to have made an invention of this last class,

In endeavoring to improve machinery of this description, the attention of the inventor would naturally be directed to one of two objects, either by new contrivances and adaptations to increase the energy of a given propelling power, or to diminish the resistance—in either case the same result would be sought, namely, to do more and better work with the same power. Now the Plaintiff pretends that he has done, not the former, but the latter—that he has lessened the resistance, and this not by adding anything or taking anything away, but by making a new arrangement and position of the valves, and by other changes which have been specified—so that the passage for the water is rendered more direct, and the obstructions to its easy and rapid propulsion decreased. The certain result of these changes (says the Plaintiff,) is, that by the application of the same power, water can be projected further and in greater volume than can be done by the old machine. If the Plaintiff can establish that he has introduced such an improvement, his invention, without doubt, entitles him to take out and to maintain Letters Patent for his exclusive right—and such right, it is to be observed, is not affected by the smallness in degree of the apparent change made by the new combination. If the change is certain and its improved result certain, and it is essential to such result, it is of no importance that it does not appear to be a great change. I now come to the evidence. The first thing to be proved is that the Letters Patent have issued. They are produced, and being under the Great Seal of the Province prove themselves. The second is that the Plaintiff invented the improvement, and that it is new : upon this point the Jury must be satisfied with such an amount of evidence as will afford reasonable ground for believing that the thing is new, for it is obviously impossible to know absolutely, in any case, that a given contrivance has never been used or seen by any body before. (His Honor here referred to the contradictory

nature of the evidence on this point.) On the question, if the change be an improvement, there is the same difference of opinion. However, there is, on this head, the fact that the Engine has done more than any engine has done before; and there is also the acknowledgments of Mr. Perry, though they do not prove the point, inasmuch as the Jury are to decide the fact, not the admission of any person whatever. With respect to the infringement, that does not seem to be called in question by the Defendant. It is established that he made an Engine with the improvements secured by Muir's Patent; and any deviation is of no consequence if Muir's plan was followed. If the Plaintiff's proof is sufficient, it becomes necessary to assess the value of the improvement—for in that case the right of the Plaintiff, under the Statute, will be to recover three times the amount of such value. It is without doubt of importance that inventors should be protected in their just rights, but it is also of importance that the public should not be debarred from the free use of a machine, unless he who claims an exclusive property in it, can justify his title by clear and strong evidence. The Jury will have to find specially upon all the facts articulated and settled by the Court, and in order to enable them to do so a copy of the paper is furnished them.

The Jury found for the Plaintiff upon all the facts, and returned a verdict for £30.

**MACK and MUIR**, Attorneys for Plaintiff.

**JOHNSON, F. G.** for Defendant.

No. 725 { PROWSE,..... *Plaintiff.*  
of { vs.  
1852. { PANUELO,..... *Defendant.*

Held, that in an action for an infringement of a right of Patent for Lower Canada, the allegation of an infringement "in the County of Montreal" is sufficient indication of the place where the infringement took place.

**Judgment the 4th day of May, 1852.**

**Action for an infringement of a right of Patent.**

The declaration alleged the granting of Letters Patent for Lower Canada, to the Plaintiff, as inventor of a new method of constructing hot-air furnaces ; that the defendant, after the granting of the Letters Patent “ within the term of years in “ the said Letters Patent specified or mentioned, and before “ the commencement of this suit, to wit : on the 1st May, “ 1851, and on each and every day between the last men- “ tioned day and the commencement of this suit, within “ Lower Canada aforesaid, to wit, *in the County of Mont-* “ *real* aforesaid, unlawfully, unjustly, &c. &c.”

**(Setting out the infringement of the Patent.)**

The Defendant filed an *exception à la forme*, on the ground that the declaration did not point out with sufficient certainty *in what place*, parish, village, township, city, &c., the pretended *délit* had been committed, and that the allegation that it had been committed "in the County of Montreal" was insufficient.

Issue was joined on the exception.

**MONDELET**, dissenting :—I would maintain the exception. The declaration should show the Defendant what he is called upon to answer. There are a great many parishes in the Island of Montreal—which is the one where the infringement took place ? There is no express law, but the general rule I take to be this ; that whenever it is necessary to name any place, it should be named so that the party who has an interest in knowing where it is situated, cannot be mistaken. (1)

**VANFELSON**, J. giving the judgment of the Court, said : It is admitted that there is no express law upon the subject under consideration. If it is necessary to state the village or parish, why not the *Côte*, and if in a city why not the street or the number of the house ? In these questions of Patents, I would test the sufficiency of the allegations by the english law. In the present instance, the Plaintiff has not taken so wide a latitude as he would be entitled to under the the english form, where it is only necessary to allege an infringement within the limits of the locality for which the Patent is granted.

Exception dismissed : judgment not *motivé*.

**MONK and BUCHANAN**, for Plaintiff.

**DRUMMOND and LORANGER**, for Defendant.

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(1) Jousse sur l'Ordonnance 1667. Tit. 11, des Ajournements, Art. 1.

## SUPERIOR COURT.—MONTREAL.

Before DAY, SMITH and MONDELET, Justices.

No. 8 { McPHERSON..... *Plaintiff*.  
 of { vs.  
 1851. { IRWIN,..... *Defendant*.

Held, that an interlocutory judgment requiring Boston and Coffin, joint-sheriff, to deliver up certain machinery seized under process of revendication cannot be made executory against Boston alone, he having since the judgment become sole Sheriff, and the judgment not having been signified to or made executory against him :—The rule for *contrainte* discharged.

Jugé, qu'un ordre donné par la Cour à Boston et Coffin, shérifs conjoints, de livrer une machine saisie par voie de revendication ne peut être mis en force contre Boston seul, resté seul Shérif depuis l'ordre donné, en autant que cet ordre ne lui avait pas été signifié, ni déclaré exécutoire contre lui :—La règle pour *contrainte* contre lui à cet effet mise au néant.

Judgment 23rd day of December, 1851.

On the 4th April, 1849, certain machinery, part of a steam-engine was seized under process of revendication. The Defendant moved to quash the seizure, and on the 24th of July, 1849, judgment was pronounced, ordering the Sheriff to deliver over to the Defendant the articles and effects attached. On the 15th July, 1851, the Defendant moved that inasmuch as the judgment had been duly served “ upon “ Messrs. Boston and Coffin, Sheriff of the said District, on “ the 19th April last, and inasmuch as the said Sheriff hath “ not at any time complied with or executed the said order “ or interlocutory judgment, but hath hitherto wholly failed “ so to do, and the said articles and effects so seized have “ not, nor have any of them, been delivered over to the said “ Defendant, notwithstanding repeated demands have been “ made to that effect, and that the said effects are still in “ the possession, custody and power of the Sheriff of the “ said District, that the said Sheriff of the said District,



" John Boston, Esquire, do appear. &c. &c. &c., to show  
 " cause, why the said goods and effects have not been de-  
 " livered up to the said Defendant, and that the said Sheriff  
 " do then and there deliver to the said Defendant, the said  
 " goods and chattles in compliance with the terms of the  
 " said Interlocutory Judgment, and in default thereof the  
 " said John Boston be thereto *contraint par corps*, and  
 " committed to the common jail of this District, there to re-  
 " main until the said articles and effects shall have been  
 " duly delivered up as aforesaid." Subsequently to the  
 judgment, Mr. Coffin had resigned, and a new Commission  
 had issued on the 17th May, 1851, appointing Mr. Boston  
 sole Sheriff.

The Sheriff showed cause against the rule on the ground  
 that the proceedings should have been taken against John  
 Boston and William F. Coffin together, and that no respon-  
 sibility for the acts of the joint-sheriff could attach to John  
 Boston alone : that there was nothing to shew that the  
 Interlocutory Judgment of the Court had ever been served on  
 John Boston, the present Sheriff, or that the goods claimed  
 had ever come into his possession : and further alleged that  
 a solvent guardian having been named, the Sheriff was not  
 responsible.

SMITH, J. dissenting. The question is whether a judg-  
 ment against Boston and Coffin, joint-sheriff, can be made  
 executory against Boston alone. I think it can. The com-  
 mission of Boston and Coffin rendered them jointly and  
 severally liable, and one of them could not escape by plead-  
 ing the act of the other. On the retirement of Coffin, although  
 a new commission became necessary, and technically  
 speaking Boston alone was substituted in the place of Boston  
 and Coffin, yet legally it was the same officer. There was  
 no actual delivery of the property seized in this cause from  
 Boston and Coffin to Boston alone, nor was such delivery

necessary : the law presumes that they still remain in Boston's possession. Besides the rule charges the Sheriff with being still in possession of the property, and he has not denied this possession, but has met the rule with a technical objection."

Day, Justice, in giving the judgment of the Court said : There is no doubt as to the right of the Defendant to have the rule made absolute, but the question is as to the form and manner in which this right is to be urged. The common sense view is, I admit, that taken by my learned brother.

[His Honor here stated the facts connected with the resignation of Mr. Coffin and the issuing of a new commission addressed to Mr. Boston.]

That commission makes no allusion to any resignation or to Mr. Boston's having been previously joint-sheriff. The Court, therefore, technically speaking, is not to know that John Boston, the present Sheriff, mentioned in the commission, is the John Boston who was formerly joint-sheriff with W. F. Coffin. The rule should have set this up, instead of which it calls on Boston, *de plano*, to produce the goods or go to jail. I do not read in the rule, as my learned brother does, that John Boston has come into the possession of the goods seized as the successor of Boston and Coffin. It sets out : " that the said effects are still in the possession of the " Sheriff of the said District," and then there is a new paragraph " That the said Sheriff of the said District, John Boston, Esquire, do appear " &c., &c. Now Boston was not " Sheriff of the said District " at the time the order was made, but Boston and Coffin were, and there is nothing to show that the order has ever been made executory against Boston. I can see no difference between the position Mr. Boston holds here, and that which would be held by a person of any other name. Papers and other official documents

number of the hypothecary creditors of the Defendant filed their claims, and among others were the Opposant, Aylwin, and the Opposant, Campbell ; both these Opposants claimed a privilege as *bailleur de fonds* under the same title, being a deed of sale by the said Aylwin to the Defendant of one of the lots sold in the cause, executed before Lindsay and another, Notaries, the 7th May, 1845. Campbell further alleged a deed of assignment executed before Campeau and another, Notaries, the 31st May, 1849, by the said Aylwin to the said Campbell, of a portion of the price of sale or consideration money mentioned in the deed of the 7th May, 1845. This deed of assignment had been made "without any warranty whatsoever, unto the said Archibald Campbell, hereof accepting *à ses frais, risques et périls*." The officer of the Court, by his report of distribution and collocation filed in the cause, collocated Aylwin and excluded Campbell, upon which Campbell contested the report ; his reasons of contestation were in substance as follows :

That the Opposant Campbell, by law, had a right to be collocated and paid by privilege of *bailleur de fonds*, equally and concurrently with the said Opposant Aylwin, out of the proceeds of the immoveable property sold in the cause, in proportion to their respective claims, because the claims of the said Aylwin and Campbell, respectively, were founded upon the same title, and that therefore his privilege was equally favorable with that of the said Aylwin.

MEREDITH, Justice : If the deed upon which the claim of the Opposant Campbell is founded, were such as it was represented by the learned Counsel for the creditor collocated, namely an acknowledgment of payment, accompanied by a subrogation ; and if that subrogation could be regarded as the act of the debtor, even with the consent of the creditor, the case would not be susceptible of difficulty.

Renusson, in the Chapter referred to, puts the question that would then have arisen thus : "On demande si celui  
 " qui prête ses deniers au débiteur pour acquitter partie de sa  
 " dette, et qui stipule sa subrogation aux droits du créancier,  
 " qui est payé de ses deniers, aura même hypothèque que  
 " le créancier auquel il est subrogé, s'il viendra par con-  
 " currence avec lui sur les biens du débiteur, ou si le cré-  
 "ancier doit être payé de ce qui lui est dû de reste, pré-  
 " férablement au subrogé" (1).

The author decides that a party, so lending money to a debtor, cannot be collocated to the prejudice of the creditor; and the justice of this decision appears to me to be unquestionable.

But the case put by Renusson bears, I think, no analogy to the case under our consideration.

The case in Renusson is that of a party who lends money to a debtor, to discharge part of a debt due by that debtor, and who stipulates for a subrogation in the rights of the creditor receiving the sum of money so lent.

In the case before us, the Opposant Aylwin, by a deed of transfer in the usual form, sells and assigns to Campbell part of a debt due to him, Aylwin, by the Defendant, Henry; the price received by Aylwin being exactly equal in amount to the part of the debt transferred.

The effect of the sale and assignment thus made, was to vest the part of the debt thus sold, with all the rights attached to it, in the purchaser; and he is in as favorable a position with respect to the part of the debt thus sold and assigned to him, as the seller is with respect to the part of the debt which he retained.

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(1) Renusson, *Traité de la Subrogation*, ch. 15.

The law on this subject is very clearly explained by Duranton, Vol. 12, No. 187, p. 387, as also by Troplong, Priv. and Hyp. Vol. 1, No. 367, p. 562, Battus Vol. 1, No. 128, p. 217.

I have not found any conflicting opinion as to the case now before us, which is that of an ordinary assignment; nor as to that mentioned by Renusson, which is the case of a subrogation by the act of the debtor (1); and the authors agree in saying, that even where the creditor who receives the money consents to a subrogation so made, it will not prejudice his right. The case with respect to which there is difference of opinion, is as to the effect of subrogation by the creditor to a third party, without the consent of the debtor. Toullier (2), Duvergier (3) and Persil (4), contend that such subrogation is equivalent to an assignment, and subjects the creditor to a warranty. Troplong (5), (who cites Pothier in support of his own views) is of a contrary opinion. It is obvious, however, that the Opposant collocated cannot derive any advantage from either of those views; and I mention the case in relation to which they are entertained, merely in order that it may be seen, that it bears no resemblance to the case before us.

Much stress was laid by the Counsel for the Opposant collocated, on the declaration in the assignment that it was made without warranty.

It is not necessary now to enquire, what may be the effect of that declaration as between the Grantor and the Grantee, in the event of the latter being unable to obtain payment from the debtor (6); it is sufficient to observe that that de-

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(1) 7 Toullier, No. 169, p. 238.

(2) 7 Vol. Nos. 118, 119, p. 139; No. 120, pp. 146, 147, 148.

(3) 2 Vol. p. 355, 363, 364.

(4) 1 Vol. Priv. and Hyp. p. 82.

(5) 1 Vol. Priv. and Hyp. No. 349, p. 535; No. 353, p. 542.

(6) 2 Duvergier, No. 267, p. 323:—1 Troplong, Priv. and Hyp. No. 367, p. 563:—7 Toullier, No. 164, p. 234:—See also, 10 Duranton, No. 489, p. 499.

claration was not, I think, intended to operate, and cannot operate to the prejudice of the Grantee, in so far as regards his right to rank on the property of the debtor.

I am therefore of opinion that the contestation must be maintained.

Judgment maintaining contestation and ordering the report to be reformed, and the Opposant Campbell to be collocated concurrently with the Opposant Aylwin.

ANDREWS and CAMPBELL, for Opposant Campbell,  
LELIEVRE and ANGERS, for Opposant Aylwin.

## SUPERIOR COURT.—MONTREAL.

Before DAY, SMITH and MONDELET, Justices.

|         |   |                                                       |
|---------|---|-------------------------------------------------------|
| No. 490 | { | SEYMOUR ET AL,..... <i>Plaintiffs.</i>                |
| of      |   | vs.                                                   |
|         |   | ST. JULIEN, the younger,..... <i>Defendant.</i>       |
| 1852.   | { | and                                                   |
|         |   | ST. JULIEN, the elder,..... <i>Intervening party.</i> |

Held, 1st. That where an Intervention, filed under the 92d Section of the Judicature Act, does not disclose on its face any interest or right in the Intervening party, the Court will dismiss it from the record on motion. 2nd. That a new inscription is not necessary, the case being already inscribed, and not having lost its place on the roll.

Jugé, 1o. Qu'une Intervention produite en vertu de la 92e section de l'Acte de Judicature, qui ne fait pas apparaître de l'intérêt ou droit d'intervention, peut être renvoyée et rejetée du record sur une simple motion. 2o. Qu'il n'est pas besoin d'une nouvelle inscription dans ce cas pour procéder à l'audition de la cause, lorsqu'elle a été suspendue par l'enfilure d'une telle Intervention.

Judgment the 14th day of April, 1852.

In this case the Plaintiffs, traders and copartners, sued the Defendant on an account for goods sold and delivered.

The proof was completed, and the cause inscribed on the roll *de droit* for hearing on the merits, on the 1st of April, 1852. The following day an Intervention was filed in the name of Antoine St. Julien, the father of the Defendant. This Intervention set forth the indebtedness of the "Plaintiff" (*le Demandeur*) to the *Requérant* in a sum exceeding the amount sued for, in consideration of which "*ce dernier* lui "aurait transporté en paiement de partie de ce qu'il lui "devait, la somme réclamée par cette action, due par le Défendeur, qui étant alors et là présent, aurait accepté la "délégation et en aurait alors et là été déchargé par le "Demandeur;" No *acte* of transfer, delegation, or signification was filed with this Intervention, the effect of which, under the 92d section of the Judicature Act, was to stay proceedings.

The Plaintiffs moved to reject this Intervention, the grounds mainly relied on being—1st. Because no sufficient cause was disclosed on the face of the Intervention to give the party a right to intervene: 2nd Because it was not alleged that the Plaintiffs were ever indebted to the Intervening party, or were ever parties to the pretended delegation. 3rd. Because it was not alleged that the pretended delegation was ever accepted by the Intervening party, or that he was a party thereto. There were other reasons based on irregularities in the service, but as the judgment did not touch these, it is not necessary to state them. The motion was accompanied by affidavits of the Plaintiffs denying the allegations of the Intervention.

DAY, Justice :—This is a motion to reject an Intervention filed after inscription for final hearing, on the ground principally, that it does not disclose any right or interest in the Intervening party, and the point which arises is a new one, and is important as regards the practice of the Court. The clause of the Statute under which the Intervention has been

filed is, (1) to say the least of it, of a very broad character, and seems to have been drawn without sufficient caution or regard to the possible use which might be made of it by dishonest litigants to retard the progress of a cause ; taken literally, an Intervening party can come in at any stage of the proceedings and prevent a Plaintiff from obtaining his judgment, without having the shadow of a right himself. Such being the case, it is plainly the duty of the Court to give the clause a beneficial interpretation, and deprive it, as far as possible, of the mischievous effects, which could not have been foreseen by the Legislature. The motion now before us must be granted for the following reasons :—1st. Because the action having been brought by the Plaintiffs, the Intervening party alleges an agreement with “ the Plaintiff,” without saying which of them. 2nd. Because while the Intervening party alleges that the transfer was made when the Defendant was present, and promised to pay him instead of the Plaintiff, he does not say that he accepted thereof. 3d. Because the Intervening party shows no interest in the matter. Supposing all he says to be true, and the form of the Intervention regular, still he is without interest. The facts set up only give him a right of action against the Defendant—none to prevent the Plaintiffs from getting their judgment. The matter set up is matter which might have been set up by the Defendant, but which the Intervening party has no interest in setting up. If the Defendant did not choose to set up the transfer, that cannot affect the Intervening party’s rights. If insolvency had been alleged, there might have been something to say, though I should still have had doubts. As it is, the Intervening party has no color of right, and the so styled Intervention is a piece of paper on which no judgment can be given, and which must be rejected, with costs.—Judgment accordingly.

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(1) 12th Vict. Cap. 38, Sec. 92.



On the cause (which had not lost its place on the roll) coming on for hearing on the original inscription, an exception was taken by the Defendant's Counsel, to the effect that there ought to have been a new inscription, and that, inasmuch as he was not bound to know that the Intervention which had been filed, and of which he had received notice, was disposed of, the present inscription was irregular, and the cause must be struck from the roll.

On the 27th April, the Court pronounced judgment in favor of the Plaintiffs for the amount sought to be recovered.

DAY, Justice, in regard to the pretension set up by the Defendant's Counsel, said : The clause of the Judicature Act merely provides that all proceedings, after an Intervention is filed, shall be stayed—nothing more. As soon as the obstructing cause is removed, therefore, the parties remain as they were before. The Court can adopt no other rule than this. If it were not so, it might be impossible for a party ever to get a judgment. If the Intervention in this case had been contested, and not dismissed, the rule would be different, and a new inscription would be necessary. As it is, it is not necessary.

**FLEET and DORMAN, Attorneys for Plaintiffs.**

**DOUTRE, for Defendant.**

**LANCOT, for Intervening party.**

## BANC DE LA REINE.—DISTRICT DE MONTREAL.

(EN APPEL.)

Présents : ROLLAND, PANET, AYLWIN et C. MONDELET,  
Juges.HALCRO.....Appelant,  
et

DELESDEMIERS.....Intimé.

Jugé 1. Que sous l'opération des 86 et 87 sections du Statut de la 12 Vic. c. 38, il suffit, dans aucun plaidoyer, d'énoncer les faits sur lesquels une partie entend s'appuyer, en termes clairs et précis, et auxquels s'appliquent les règles d'interprétation applicables aux mêmes termes dans les transactions ordinaires de la vie, sans qu'il soit besoin de formules particulières pour les exprimer ;

2. Qu'on peut invoquer la nullité de l'acte sur lequel est basée la demande, par exception, sans recourir à une demande incidente, ou à une demande directe ;

3. Que cette nullité peut être opposée par exception, en tout temps, suivant la règle de droit, *quæ temporalia sunt ad agendum, perpetua sunt ad excipiendum*.

Held 1. That under the 86 and 87 Sections of the Statute of the 12th Vic. ch. 38, it is sufficient, in any pleadings, to allege the facts upon which the party intends to rely, in plain and concise language, to the interpretation of which the rules of construction applicable to such language in the ordinary transactions of life may apply, and that no form of words is necessary to express the same ;

2. That a party may plead the nullity of the deed on which a demand against him is founded, by exception, and that neither an incidental demand or a direct action is necessary for that purpose ;

3. That such nullity can be pleaded at any time by Exception, according to the rule of law, *quæ temporalia sunt ad agendum, perpetua sunt ad excipiendum*.

Jugement le 8 Juillet, 1852.

L'action en Cour Supérieure était portée pour le recouvrement de £72 2s 6d, montant d'une obligation consentie par l'Appelant à l'Intimé, " pour valeur reçue, avant la passation du dit acte, en effets et marchandises vendus et livrés " par le dit Intimé à l'Appelant, et dont ce dernier se déclarait content et satisfait."

A cette demande, l'Appelant opposa deux exceptions, alléguant, par la première, que longtemps avant, et à l'époque de la passation de la dite obligation, l'Appelant avait été et était alors dérangé dans ses facultés mentales, (*of unsound*

*mind, memory and discretion,*) et incapable de comprendre, consentir ou devenir partie à aucune obligation, hypothèque ou acte, de manière à encourir aucune obligation ou responsabilité, ce qui était à la connaissance de l'Intimé, et qu'ainsi la dite obligation était nulle en loi ; l'Appelant concluait en conséquence à ce que le dit acte fut déclaré nul, rescindé et mis de côté, et l'action déboutée.

Par la seconde exception, l'Appelant alléguait qu'au temps de l'exécution du dit acte, il était faible d'intelligence, *of weak, feeble and deranged intellect*, et incapable de gérer ses affaires ; que l'Intimé ayant eu des affaires avec Andrew Halcro, fils de l'Appelant, qui lui était endetté, aurait, conjointement avec le dit Andrew Halcro, par des menaces et des représentations injustes et frauduleuses, contraint et engagé l'Appelant à devenir partie à la dite obligation, le Défendeur étant alors d'un esprit faible, dérangé et disposé à subir l'influence de l'Intimé et de son fils ; que l'Appelant était incapable de voir à ses affaires à raison de l'incapacité et du dérangement de ses facultés mentales, et que l'Intimé et le dit Andrew Halcro, connaissant cet état de l'Appelant, et par les moyens susdits, l'engagèrent et le contraignirent à passer la dite prétendue obligation, comme si la dette eut été contractée en faveur de l'Intimé par l'Appelant, ce que ce dernier niait ; qu'en conséquence il avait droit de demander la résiliation, rescision et nullité de la dite obligation, et concluait à ce que, par le jugement, la dite prétendue obligation fut déclarée nulle et de nul effet, et fut rescindée et mise de côté. Suivait une exception de paiement.

Le Demandeur répondit en droit, par forme de *demurrer*, à la première exception, dont il demandait le renvoi pour les raisons énoncées comme suit en sa réponse :

1. Parcequ'il n'est pas allégué en la dite Exception, que le Défendeur ait jamais été interdit, et nommément à la date de la dite obligation.

2. Parcequ'il n'est pas allégué dans la dite Exception, que le Défendeur, lors de la passation du dit acte, n'était pas vraiment et légitimement endetté au Demandeur au montant porté en icelle, ni que ce montant n'était pas dû au Demandeur.

3. Parcequ'il n'est pas allégué que le Demandeur n'a jamais donné valeur ou considération au Défendeur pour ou en raison de la dite obligation, ni que le Défendeur l'avait signée sans avoir reçu de valeur ou considération du Demandeur.

4. Parcequ'il n'est pas allégué, dans la dite Exception, que le Demandeur était coupable de fraude ou de dol envers le Défendeur, lors de l'exécution du dit acte, ni que le Demandeur avait employé la fraude ou le dol pour induire le Défendeur à consentir cette obligation.

5. Parcequ'il n'est pas allégué, que le Défendeur a été fraudé ou trompé par le Demandeur en passant et consentant cette obligation, ni qu'il l'a trompé ou fraudé en aucune manière à raison de cette obligation.

6. Parcequ'il n'est pas allégué que le Défendeur souffrira des dommages ou quelqu'injustice par la condamnation à payer ce qu'on lui demande.

7. Parceque le Défendeur n'allègue pas qu'il n'a jamais reçu les effets et marchandises pour lesquels l'obligation paraît avoir été consentie, ou que le Défendeur n'était en aucune manière endetté, à cette époque, au Demandeur.

8. Parcequ'il n'est pas allégué qu'à l'époque de l'exécution de la dite obligation, le dérangement ou la faiblesse d'esprit du Défendeur était généralement connue.

9. Parcequ'il n'est pas allégué que, lors de la dite obligation, le Défendeur était aliéné ou entièrement dérangé dans

ses facultés mentales, de manière à être entièrement incapable de vaquer à ses devoirs ordinaires, ni qu'il était privé de raison au point de ne pouvoir comprendre ce qu'il faisait ou ce qu'on exigeait de lui.

10. Parceque, par la loi, il est maintenant trop tard pour demander la rescision, ou rejet et nullité de la dite obligation, vu qu'il s'est écoulé plus de dix ans depuis sa passation (au-delà de quinze ans).

11. Parceque le Défendeur n'allègue pas qu'il ait fait aucune diligence ou fait aucune démarche pour obtenir la rescision du dit acte.

12. Parceque le Défendeur ne peut, au moyen d'une exception, demander ni obtenir la rescision de la dite obligation.

13. Parceque la dite exception et ses conclusions sont illégales et insuffisantes, et que les allégués de la dite exception ne peuvent en autoriser ou justifier les conclusions, et que la dite exception n'est pas une réponse à la demande, ni un plaidoyer à l'action du Demandeur.

Les mêmes moyens, à l'exception des 4ème et 5ème, étaient opposés à la seconde exception.

Le Demandeur rencontra également par une réponse en droit l'exception de paiement.

Les parties ayant été entendues en droit, la Cour Supérieure, composée des Juges SMITH et MONDELET, rendit le jugement suivant le 22 juillet, 1850 :

“ The Court having heard the parties by their Counsel  
 “ upon the Plaintiff's three demurrers to the Defendant's  
 “ pleas, examined the proceedings, and having deliberated  
 “ thereon, doth maintain the first two demurrers of the Plain-

“ tiff to the first and second pleas of the Defendant, and in  
 “ consequence doth dismiss the said pleas, and doth further  
 “ dismiss the demurrer to the said Defendant’s third plea—  
 “ costs compensated.”

Le Défendeur Halcro appela de ce jugement qui déboutait ses deux premières exceptions, prétendant que la seule objection sur laquelle le Demandeur s’était appuyé, lors de l’audition, était la 10ème, et qu’elle était manifestement mal fondée et contre la maxime reçue, “ *Quæ temporalia sunt ad agendum, perpetua sunt ad excipiendum.*” Tant que dure la demande, tant dure l’exception. Cette règle, dit Brétonnier, (sur Henrys, tome II, liv. 4, quest. 64) est triviale au palais. L’Appelant citait également 7 Toullier, Nos. 598, 600 et 602. (1)

La majorité de la Cour, (ROLLAND, Juge *dissentiente*), rendit le jugement qui suit :

“ Considering that under the 87th section of the Statute  
 “ of the 12th year of Her Majesty’s reign, chapter 38, no  
 “ form of words is necessary in any pleadings, but the  
 “ parties litigant may respectively state *bonâ fide*, and to the  
 “ best of their belief, the real facts on which they intend to  
 “ rely and which they allege to be true, and offer to prove, in  
 “ plain and concise language, to the interpretation of which  
 “ the rules of construction, applicable to such language in  
 “ the ordinary transactions of life, do and shall apply, so  
 “ that no allegation or statement may or shall be held to be  
 “ insufficiently made, if it would be ordinarily understood  
 “ to have the meaning intended by the party using it. Con-

(1) Autres autorités citées par l’Appelant :

10 Dalloz, Vbo. Obligations, § 2, No. 1, pp. 458, 639.

1 Domat (Edit. in 8vo, 1835) tit. 1, § 5, No. 1 pp. 151, 152, 191 :—*Ibid*, liv 1. tit 1, p 380.

Dénizart, Décisions, Vbo. Rescision, p 471.

Pothier, Obligations, No. 49.

2 Troplong, Vente, pp 163, et suiv.

“sidering that, under the 86th section of the same Statute,  
 “it is provided that to all allegations of fact, in any plead-  
 “ing, the ordinary rules of legal construction shall apply, so  
 “that it shall be sufficient, to support any pleading, that the  
 “facts in it agree sufficiently with those proved to maintain  
 “the conclusions of such pleading, or some of them, and  
 “that the Court shall be of opinion that the opposite party  
 “could not have been misled, by such pleading, as to the  
 “real nature and effect of the facts intended to be therein  
 “alleged and to be proved under such pleading ; and that  
 “the facts, stated by the Appellant, in his exceptions, suffi-  
 “ciently apprise the Respondent that the Appellant rests his  
 “defence on the ground of insanity, want of consideration  
 “and duress ; considering further that under the rule of  
 “law, *quæ sunt temporalia ad agendum, perpetua sunt ad*  
 “*excipiendum*, it was competent to the Appellant to set up  
 “the said defence, that the conclusions taken by the Ap-  
 “pellant are amply sufficient, and that in the judgment of  
 “the Court below, maintaining the demurrers of the Res-  
 “pondent to the said pleas of the Appellant, there is error :  
 “This Court doth reverse the said Judgment appealed from,  
 “and proceeding to render such Judgment as the Court  
 “below ought to have rendered, doth overrule the said de-  
 “murrers, and doth order that the Record be remitted to the  
 “Court below for the adduction of evidence upon the issues  
 “tendered by the Appellant, and such further proceedings had  
 “as to law and justice appertain ; and, lastly, it is ordered  
 “that the Respondent do pay to the Appellant all costs by  
 “him incurred in this behalf, &c.”

A. et G. ROBERTSON, pour l'Appellant.

MACRAE et WOOD, pour l'Intimé.

## COUR SUPERIEURE.—QUEBEC.

Présents : DUVAL et MEREDITH, Juges.

|                        |   |                                               |
|------------------------|---|-----------------------------------------------|
| No. 636<br>de<br>1852. | { | METHOT <i>et al.</i> ..... <i>Demandeurs,</i> |
|                        |   | vs.                                           |
|                        |   | O'CALLAGHAN..... <i>Défendeur,</i>            |
|                        |   | et                                            |
|                        |   | LAMPSON..... <i>Opposant.</i>                 |

Jugé, que la vente de ce qui reste à courir d'un bail emphytéotique, désigné comme tel dans l'avertissement du Shérif, impose à l'adjudicataire l'obligation de payer le canon emphytéotique, quoique cela ne soit pas expressément dit dans cet avertissement, et quoiqu'il n'y ait pas d'opposition afin de charge à cet effet; et conséquemment, que le créancier, à qui est dû cette rente ou canon emphytéotique, ne peut pas demander à se faire indemniser à même le prix de l'adjudication, sous le prétexte que sa rente et ses autres droits résultant du bail sont perdus, parcequ'il n'a pas fait d'opposition afin de charge.

Held, that the sale of the unexpired period of an emphyteotic lease, described as such in the Sheriff's advertisement, imposes upon the purchaser the obligation of paying the stipulated rent of such lease, although this is not made an express condition of the sale in such advertisement, and although there be no opposition *afin de charge* for the preservation of such rent; and consequently, that the creditor of the rent of such emphyteotic lease, cannot claim any indemnity upon the price of sale, upon the pretext that the rent aforesaid and the other rights appertaining to him under the lease, are lost, by reason of his not having filed an opposition *afin de charge*.

Jugement rendu le 22 Avril, 1852.

L'Opposant, Lampson, ayant omis de filer une opposition afin de charge, pour faire vendre l'immeuble saisi en cette cause, sujet à une rente annuelle, à lui due, en vertu d'un bail emphytéotique, s'était imaginé avoir perdu cette rente, et en réclamait la valeur par une opposition afin de conserver, sur le prix de l'adjudication.

Le Défendeur contesta cette opposition.

Il fondait sa contestation sur ce que l'Opposant n'avait pas perdu la rente annuelle, qui lui était due en vertu de son bail, au moyen du décret en cette cause; car ce décret était



la vente du bail même, lequel décret assujétissait, de toute nécessité, l'adjudicataire au paiement du canon emphytéotique. Le jugement motivé rendu sur cette contestation, et le sommaire en tête de ce rapport, expliquent suffisamment les questions de faits et les points de droit jugés dans cette cause.

“ La Cour.....considérant que la vente, par le shérif de ce district, du terme restant à expirer du bail emphytéotique mentionné dans son rapport, était une vente des droits du Défendeur sur la propriété décrite au dit bail, et que ces droits du Défendeur consistaient dans ceux qui lui sont conférés par le dit bail, de jouir de la propriété pendant un certain temps, à la condition de payer une certaine rente annuelle, canon emphytéotique, stipulé au dit bail ; considérant que la dite rente est une partie essentielle du dit bail, et n'en peut être séparée, et n'a pu être et n'a pas été de fait perdue par la vente du terme à expirer du dit bail, déboute l'opposition du dit William Lampson, par laquelle il réclame, sur le prix de l'adjudication, la valeur de la dite rente, avec dépens.

CARON et BAILLARGÉ, pour les Demandeurs.

O'FARRELL, pour le Défendeur.

STUART et VANNOVOUS, pour l'Opposant.

## COUR SUPERIEURE.—QUEBEC.

Presents : BOWEN, Juge en Chef, DUVAL et MEREDITH, Juges.

|          |   |                |                   |
|----------|---|----------------|-------------------|
| No. 1887 | { | MURPHY.....    | <i>Demandeur,</i> |
| de       |   |                | vs.               |
|          |   | O'DONOVAN..... | <i>Défendeur.</i> |
| 1852.    |   |                | et                |
|          |   | LAMPSON.....   | <i>Opposant.</i>  |

Jugé, 1. Qu'il n'est pas nécessaire de faire enregistrer les anciens titres de propriété.

2. Qu'un propriétaire, qui a laissé vendre sa propriété sur un Défendeur, qui ne la détenait qu'à titre de bail emphytéotique, peut demander d'être indemnisé de la perte de sa propriété sur le prix de l'adjudication.

Held, 1. That it is not necessary to cause registration of old titles to property.

2. That a proprietor, who has allowed his property to be sold upon an execution against a Defendant, who held it merely under an emphyteotic lease, can claim an indemnity for the loss of his property upon the price of the sale of such property.

Jugement rendu le 22 Avril, 1852.

Dans cette cause le Demandeur avait fait saisir et vendre sur le Défendeur un immeuble, comme s'il en eût eu la propriété absolue, tandis qu'il ne la détenait qu'à titre de bail emphytéotique, en vertu d'un certain acte, consenti par l'Opposant, William Lampson, le 13 Août, 1847, pour 21 ans, à compter du 1er Août, 1847, à raison de six livres courant par année. Lampson, propriétaire du fond, et créancier de la rente ou canon emphytéotique, avait laissé vendre cet immeuble, sans former d'opposition en nullité de la saisie.

L'immeuble vendu, il s'était présenté, par opposition afin de conserver, pour réclamer, par privilège, le montant de l'adjudication, comme étant la valeur de son immeuble induement saisi et vendu.

Son opposition fut contestée par le Demandeur, pour plusieurs raisons, entre autres sur ce que le titre de propriété de Lampson n'avait pas été enregistré ; mais lors de l'argument, la question des droits du propriétaire et de l'indemnité qui lui est due, dans le cas posé plus haut, furent uniquement les points soumis à la Cour.

Le jugement est motivé comme suit :

La Cour.....considérant que le Demandeur, Patrick Murphy, a contesté l'opposition de Lampson, sur le principe qu'il n'a point fait enregistrer son titre d'acquisition de J. B. Forsyth, en date du 2 décembre, 1840, ni fait enregistrer le bail emphytéotique par lui consenti au nommé Hogan ; considérant que l'enregistrement de ces actes n'étaient pas nécessaires pour conserver les droits de propriété réclamés par le dit Lampson ; considérant qu'une partie de la propriété du dit Lampson a été vendue comme appartenant au Défendeur, etc., etc., renvoie la contestation du dit Murphy, et maintient l'opposition du dit Lampson.

O'FARRELL, pour le Demandeur.

STUART et VANNOVOUS, pour Lampson.

## SUPERIOR COURT.—MONTREAL.

Before DAY, SMITH and MONDELET, Justices.

No. 1193 { LAROCQUE ET AL.,..... *Plaintiffs.*  
 of { vs.  
 1851. { ANDRES, ET AL.,..... *Defendants.*

Held, that a promissory note, payable on demand, is due from the day of its date, and that prescription runs against it from that time.

Jugé, qu'un billet promissoire, payable à demande, est dû du jour de sa date, et que la prescription court contre tel billet de ce jour.

Judgment the 14th day of October, 1851.

This was an action brought by the Plaintiffs, the holders and indorsees of a promissory note, payable on demand, against the Defendants, the makers.

The declaration alleged the making of the note by the Defendants at Montreal on the 25th February, 1837, payable on demand to the order of T. S. Brown: that Brown afterwards indorsed it to the Plaintiffs, who, on the 10th January, 1850, caused a notarial demand to be made on the Defendants, who failed to pay it, whereupon the note was protested for non-payment, by means whereof the Defendants became liable, &c. and being so liable afterwards, to wit, on the day and year last aforesaid, at Montreal aforesaid, promised to pay, &c. &c. There were also the common counts: conclusion for £150 12s. 1d., amount of note, and interest from date.

The Defendants pleaded: 1. That the note, being a note payable on demand, became due and payable from its date; that no action had been brought within five years, and no promise made by them since the making of the note, but

that the note, before the institution of this action, was paid and discharged, and they tendered their oath ; 2. A demand made by Brown within one year next after the date of the note, and that no action had been brought within five years next after such demand ; 3. That whilst Brown was the holder of the note, he became a bankrupt, and that the amount of the note was paid to his assignee, and that the Plaintiffs obtained possession of the note illegally and without consideration ; 4. *Défense au fonds en fait*.

General answers and replication.

The parties went to proof.

At the hearing on the merits, MACKAY, for the Plaintiffs, contended that the note, being a note payable on demand, could not be held to be due and payable in the sense of the Statute 34 Geo. III, c. 2, until a demand had been made, and that prescription could only run from that time. It was a note *à terme*, and not to be due till after demand. It was true that it had been held in England, in favor of indorsers, that the statute of limitations 2 Jac. 1 c. 16 runs against a note payable on demand from the day of its date, but the words of the english statute were different from those of the provincial statute, and the Court here had to interpret the contract in connection with the provincial statute, without reference to english cases decided upon other words. (1)

DAY, J. J. *contrà*, cited Byles on bills, pp. 107 and 260.

DAY, Justice : The authorities all show, that a note payable on demand, is payable from its date, and that prescription runs from then. The english authorities are conclusive on this point (2). This also is the evident construction which

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(1) Byles on Bills, pp. 124 and 255 :—9 Meeson and Welsby's Reports 15 :—4 Barnewell and Cresswell, p. 235 :—2 Rogue's Jurisp. Consulaire, p. 407 :—Guyot's Rep. v. Prescription :—Troplong, Prescription, No. 802 :—Pigeon vol. 1, p. 35.

(2) Ryan and Moody, p. 389 :—1 Selwyn's Nisi Prius, p. 372 :—15 Viner's Abridgment, p. 103.

has obtained in actions brought on these notes in this Court. Thus, if an action was brought on a note before it was due, the action would be dismissed ; but if an action was brought on a note payable on demand, and no demand was proved, it would not dismiss the action, but only affect the costs.

The following is the judgment :

“ Considering that the promissory note in the said declaration mentioned, being payable on demand, became and was due and payable on the day of the date thereof, and that a time exceeding the entire period of five years hath elapsed since the date of the said note, without any suit or action having been brought thereon, within the said period, by reason whereof and by law, the said promissory note ought to be, and is, by the Court now here, considered and held to be paid and discharged, doth maintain the exception of the Defendants in the said cause firstly pleaded, and dismiss the action of the Plaintiffs, with costs.

MACKAY and AUSTIN, for Plaintiffs.

J. J. DAY, for Defendants.

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IN THE CIRCUIT COURT.—MONTREAL.

Before BRUNEAU, Justice.

No 196 { ROCHELEAU,..... *Plaintiff.*
of { vs.
1852. { THE ST. LAWRENCE AND ATLANTIC RAILWAY .
COMPANY..... *Defendants.*

Held, that where by the charter of a Railroad Company, they are not bound to erect barriers at those points where the line crosses the public road, they are not answerable for injury done to cattle straying on the line from the public road : but that parties allowing their cattle so to stray are answerable to the Railway Company for damage done to the cars, thrown off the track by collision with such cattle.

Jugé, que dans le cas où une compagnie pour la construction d'un Chemin de Fer, n'est pas par sa charte obligée d'ériger des barrières dans les endroits où la ligne traverse un chemin public, telle compagnie n'est pas responsable des injures faites aux animaux errants sur telle ligne ; mais les parties dont les animaux errent ainsi sont responsables envers telle compagnie des dommages qui peuvent en résulter.

Judgment the 30th June, 1852.

This was an action to recover the value of a cow killed by one of the Defendants' trains, and for certain damages to the

bridges and fences of the Plaintiff, which the Defendants were obliged to keep up. The declaration alleged carelessness and unskilfulness of the servants of the company in conducting the train, and that the accident was occasioned by like carelessness : damages laid at £10 10s.

The Defendants pleaded that they were proprietors of the line of rail-road, and had a right to use the same, that the cow was trespassing, and that the accident had occurred through the negligence of the Plaintiff, and notwithstanding the endeavours of their engineer and servants to avoid a collision. They set up the same facts by an incidental demand, and alleged that by reason of the collision four of their cars were thrown off the track, and damage suffered to a large amount, which they reduced to £50.

The evidence established that the cow had strayed on to the line of rail-road from the public highway, and that notwithstanding the precautions taken by the company's servants in blowing the whistle, shutting off steam, &c., it was struck by the engine and thrown under the driving wheels. That in consequence of the collision four of the cars were thrown off the track and considerable damage done, as alleged in the incidental demand.

BRUNEAU, J. in giving judgment observed :—It has been urged by the Plaintiff that the company are bound to erect a fence or gate where the rail-road crosses the public road, and that he (the Plaintiff) has a right to use the public road. By the first Act of incorporation, the company were obliged to have a gate at such crossings, but by the amended Act this obligation has been done away with, and now the company are only required to have a sign across their track warning passers by, to “ look out when the bell rings, ” and this they appear to have done in the present instance. The company therefore are relieved of this charge, and the public

are put on their guard , and when they hear the bell ring it is for them to get out of the way. There was, therefore, no negligence in this particular, chargeable on the company : the cow was where it should not have been by the neglect of the owner. It is also in evidence that the farmers are in the habit of sending their cattle to graze along the rail-road as affording good pasture. The Plaintiff has proved that the train at the time of the accident was going at much more than the usual speed, and that the cattle were seen very far off, from which he would infer malice ; but it is shewn on the other side that the increased speed was at the moment necessary to enable the cars to mount an inclined plane, and as to the animal having been seen at a distance, it would be absurd to require the train to stop whenever cattle, which might or might not be in the direct path, were seen trespassing on the road of the company. The necessities of trade are against this. It must be recollected that this rail-road connects the waters of the St. Lawrence with the seaboard, and that interests of immense magnitude may depend on the company being able to fulfil its engagements with the public, in carrying passengers and goods at the time stipulated in their advertisements. But if Courts of law were to sanction the doctrine that the rail-road company are bound to stop their trains whenever cattle are found straying on the line of road, it is quite evident they could never fulfil their engagements, and the public interests must suffer. It is quite evident that the same judgment must be rendered, on the principle demand as was lately rendered in the cause of Vincent vs. the same Company, for killing a horse, and the action of the Plaintiff is accordingly dismissed.

The Court has had more difficulty with the incidental demand, but as it appears that the cow was a trespasser, and that notwithstanding the precautions to avoid a collision taken by the company's engineer, such collision took place through the fault of the incidental Defendant, the company

must have judgment, but only for a small amount, as they have failed to establish the precise amount of damage. The judgment therefore will be for £4 10s., which is the amount proved to have been paid to the company's workmen in replacing the cars on the track.

PELLETIER AND PAPIN, for Plaintiff.

A. and G. ROBERTSON, for Railway Company.

QUEEN'S BENCH—CROWN SIDE—MONTREAL.

Before ROLLAND AND AYLWIN, Justices.

THE QUEEN,.....	} <i>Upon indictment for Bigamy.</i>
vs.	
McQUIGGAN.....	

Held, that in an indictment for Bigamy, committed in a foreign country, it is necessary that the indictment should contain the allegations that the accused is a British subject, that he is or was resident in the Province, and that he left the same with intent to commit the offence.

Seem, that the word "elsewhere" in the provincial statute 4th and 5th Vict. ch. 27 sec. 22, extends to Bigamy committed in a foreign jurisdiction.

Jugé, que dans un acte d'accusation pour Bigamie, commise dans un pays étranger, il est nécessaire d'alléguer dans tel acte que le prévenu est un sujet anglais, qu'il est ou qu'il a été domicilié dans cette Province, et qu'il en est parti dans l'intention de commettre le crime.

Il semble, que le mot "ailleurs" dans le statut provincial de la 4e et 5e Vict. ch. 27, sec. 22, s'étend à la Bigamie commise dans une juridiction étrangère.

Sittings in March term, 1852.

The prisoner had been convicted at the last term of this Court, of Bigamy, as laid in the following indictment.

"The jurors do present that Patrick McQuiggan, late of
"the Township of Hemmingford, in the District of Montreal,

" laborer, otherwise called Patrick Carroll, on the thirteenth
 " day of January, in the ninth year of the reign of our
 " Sovereign Lady Victoria, at the parish of Anna Mullin, in
 " the County of Managhan, in that part of the United King-
 " dom of Great Britain and Ireland, called Ireland, did
 " marry one Rose Carroll, spinster, and her the said Rose Car-
 " roll, then and there had for his wife, and that the said
 " Patrick McQuiggan, otherwise &c., afterwards, and whilst
 " he was so married &c., on the seventh day of June, in the
 " fourteenth year &c., at the town of Moers, in the County of
 " Clinton, in the State of New York, one of the United
 " States of America, feloniously did marry and take to wife
 " Electa Proper, and to her the said Electa Proper was then
 " and there married, the said Rose Carroll, his former wife,
 " being then alive ; against the form of the statute in such case
 " made and provided, and against the peace of our said Lady
 " the Queen, her crown and dignity : and the jurors &c.,
 " that the said Patrick McQuiggan afterwards to wit, on the
 " twenty-fifth day of August, &c., at the Township of Hem-
 " mingford aforesaid, was apprehended for the felony
 " aforesaid."

KERR, for the prisoner, now moved in arrest of judgment,
 submitting the following grounds : 1. Because by the indict-
 ment on which the prisoner has been found guilty, no crime
 against the constitution, statutes, or common law of this
 country, has been shewn or alleged to have been committed
 by him. 2. Because the offence committed as laid in the
 indictment is an offence committed in the United States of
 America, and is cognisable alone by the laws of that country.
 3. Because the said indictment does not negative the excep-
 tion expressly mentioned in the clause of the statute creating
 the said offence.

In support of these grounds, he said : An important point of
 international law is involved in the decision of this case,

viz : whether by the word "elsewhere" in the enacting clause of the statute regarding this offence, jurisdiction is given to the Courts of this Province, over offences committed in a foreign and friendly State. The great object of international law being the preservation of peace between the nations of the world, all the domestic concerns of each State are left to its own management. To each State is committed the task of framing laws for its own peace, good government, and welfare, and of punishing all crimes committed within its own boundaries ; and this is but just and right, for that which a man may legally do in one country may constitute a crime in another. Thus a man is allowed, by law, four wives in Turkey, but by our laws he would be liable to be tried for Bigamy. It is evident therefore that the extension of the word "elsewhere" to foreign countries would tend to violate the principles of international law, and lead to the greatest injustice. On this point I refer to Story's conflict of laws, cap. 16, sec. 20, and the authorities therein mentioned, and Kent's Com. pp. 21, 37.

The next point to be considered is, whether the Legislature of Canada had any extraordinary power granted to it under the Imperial Act of the Union, by which the interpretation of the word "elsewhere," as insisted on by the Crown, could be justified. I contend that it has not—that the Province of Canada must be considered as an incorporation, created by Act of the Imperial Parliament, and vested with certain powers of which the British Parliament has divested itself in its favor. That the Provincial Legislature cannot exceed the powers so conferred on it, and if it does so the Act, as regards this excess of power, is null and void. (1)

Mr. Justice AYLWIN here interrupted the counsel to express his entire dissent from such a doctrine. The judges in this country had to administer the law as they found it, and not

(1) 7 and 8 Will. III, Caps. 22 and 23 :—4 Will. IV, Cap. 29, Sec. 56 :—1 Stephen's Com. 102.

as the judges of the Supreme Court in the neighbouring States, to set in judgment on the law itself.

KERR, proceeded :—Supposing the Court pass sentence on the prisoner, and that he suffers the penalty of the sentence, can the Court, on his discharge, grant and secure to him immunity from any further prosecution for this offence ? Will the Courts of the State of New York, on the trial of the prisoner there, for this offence committed in the body of that State, maintain his plea of *autrefois convict*, grounded on the record of conviction of this Court ? Will the Court say, under the constitution of the United States, by which concurrent jurisdiction is prohibited to the individual States, this Court has jurisdiction ? (1) I contend that all the Courts in this Province, and particularly the Court of Queen's Bench, has power to explain any ambiguous terms in any Act, especially one whereby that which was not formerly indictable at common law, is created a felony ; all penal statutes are to be construed strictly, and the Court should lean, if there are any doubtful terms in the Act, to the side of mercy and lenity : the Court has a right to expound the meaning even against the letter of the statute. It has a right to consult the preamble, and also any former Acts which may have reference to the subject : the only reasonable interpretation to be given to this word " elsewhere " is, that it was intended to give jurisdiction to this Court over offences committed in the other dominions of Her Britannic Majesty, any other interpretation would be contrary to law, justice and reason : the Act of James, under which the offence existed before the present Act, was as extensive as possible, and yet it was always held not to touch such a case as this, the mere addition of the word " elsewhere " can give no greater jurisdiction. (2)

(1) Duponceau on jurisdiction, pp. 23, 205, and 209.

(2) 1 Blackstone, p. 88 :—Deacon's Digest Vbo. Statute :—Wilson's Reports, (T. t. 3 Geo. III.) 1763, *Wolferston vs. Bishop of Lincoln* :—Montesquieu B. 7, C. 3 :—Grotius, B. 2, C. 16, S. 12, N. 2 ; Also as to point of international law, 3 Burrow, p. 1480, *Triquet et al. vs. Bath*.

DRISCOLL, Q. C. *contra*.

The words of the statute are as follows :

“ And be it enacted, that if any person, being married,
 “ shall marry any other person during the life of the former
 “ husband or wife, whether the second marriage shall have
 “ taken place in this Province, *or elsewhere*, every such
 “ offender &c., shall be guilty of felony, &c. Provided
 “ always that nothing herein contained shall extend to any
 “ second marriage contracted out of this Province, by any
 “ other than a subject of Her Majesty resident in this Pro-
 “ vince, and leaving the same with intent to commit the
 “ offence, or to any person marrying a second time whose
 “ husband or wife shall have been continually absent from
 “ such person for the space of seven years then last past, and
 “ shall not have been known by such person to be living
 “ within that time ; or shall extend to any person who, at
 “ the time of such second marriage shall have been divorced
 “ from the bond of the first marriage ; or to any person
 “ whose former marriage shall have been declared void by
 “ the sentence of any Court of competent jurisdiction.”

ROLLAND, Justice :—This is a motion to arrest judgment in the case of a man convicted of Bigamy. We have no difficulty whatever in giving a decision on this motion. A good deal has been said about this Court not having jurisdiction ; but the word “ elsewhere ” is, in our opinion, quite sufficient ; but the indictment is defective, it is not therein alleged that the accused is a British subject (the act bearing upon British subjects alone, committing such an offence in foreign countries) and we have no hesitation in arresting the judgment. It is absolutely necessary in all parallel cases that the indictment should contain the allegations that the accused is a British subject, that he is or was resident in this Province, and that he left the same with intent to commit

the offence. These allegations being wanting, judgment is arrested, and the prisoner discharged.

AYLWIN, Justice, concurred in what had fallen from the learned President of the Court. (1)

DRISCOLL, Q. C., for the Crown.

KERR, for the Prisoner.

IN THE QUEEN'S BENCH. } THREE-RIVERS.
IN APPEAL.

Before Sir JAS. STUART, BART. C. J. and ROLLAND and
PANET, Justices.

{ MALLORY,..... *Appellant*,
and
{ HART,..... *Respondent*.

Held, 1. That in cases of sales of waste lands, tradition is necessary to convey the right of property.

2. That when the purchaser by private sale of such lands does not take possession of the same, such lands may be legally seized and sold as belonging to the vendor.

3. That in such case the purchaser becomes seized of such lands, to the exclusion of the purchaser who has neglected to take possession.

4. That a partition among co-heirs, duly homologated, is evidence, as against third parties, of the quality assumed by such heirs, and it is not necessary that certificates of baptism and of marriage should be produced.

Jugé, 1. Que dans le cas de vente privée de terres non défrichées et en bois debout, la tradition est nécessaire pour transmettre la propriété.

2. Qu'à défaut de prise de possession par l'acquéreur par titre privé, ces terres peuvent être légalement saisies et décrétées sur le vendeur.

3. Que le décret saisit l'adjudicataire dans ce cas, au préjudice de l'acquéreur qui n'a pas pris possession de fait.

4. Qu'un partage homologué en justice entre co-héritiers, fait preuve à l'égard de tiers de la qualité de tels héritiers, sans qu'il soit nécessaire de produire les certificats de baptême et de mariage.

Judgment rendered 19th July, 1852.

The appeal was instituted from a judgment maintaining the opposition *afin d'annuler* filed by the Respondent in the

(1) Dwaris on Statutes, 660-667 : and cases there cited, viz : Burr. 154 Rex vs. Jarvis :—1 East, 649 Rex vs. Stone :—1 T. R. 141 :—7 T. R. 27 :—

1 Russell. C. and M. 191, Note T. " It seems, however, that when the jurisdiction of the Court depends upon particular circumstances, exclusive of the

cause. The original action was brought by the Appellant, Plaintiff in the Court below, against one Ami J. Parker, and in satisfaction of the judgment, certain lands were seized as belonging to the Defendant. The Respondent claimed the said lands, and by her opposition alleged that on the 28th February, 1814, the late Ezekiel Hart, her father, purchased at Sheriff's sale the lots of land situated in the township of Compton, known as lots Nos. 2 and 3 in the 4th range of lots in the said township, containing 200 acres of land each, and the east half of lot No. 2, in the 6th range; which said lands had been seized as belonging to Oliver Barker, under a writ of execution, and that after the formalities had been observed, the lands were adjudged to the late Ezekiel Hart by the said Sheriff, by means whereof the said late Ezekiel Hart, thereupon immediately became seized and possessed of the said lots of land as the owner and proprietor thereof, and that he continued so seized and possessed until his death, which occurred at the town of Three-Rivers on the 16th September, 1843, leaving a certain number of children, and among them the Opposant, Harriet Hart, issue of his marriage with the late Frances Lazaray, who died at Three-Rivers, in April, 1821, and between whom and the said late Ezekiel Hart, a *communauté de biens* existed. That no division of the property of the community had taken place previous to the death of the survivor of them,

offence itself, it is in general unnecessary to aver them upon the face of the indictment." 1 Moody, 407, Rex. vs. Fraser.

Note.—In this case, the proof of the first marriage was attempted to be made by the voluntary examination of the accused, taken before Thomas Clancy, Esquire, the committing magistrate, but this being irregular and defective, its reception was successfully objected to by the Counsel for the prisoner. The Crown then tendered the evidence of Mr. Clancy, as to the story the prisoner told him when taken before him after his arrest. This the Court held to be good evidence, and allowed it to go to the jury, this was the only evidence of the first marriage, the prisoner having on that occasion, as Mr. Clancy deposed, confessed to him that he was guilty of the offence, as charged, and at the same time expressed his readiness to return and live with his first wife. The second marriage was proved by the evidence of the clergyman who solemnised it.

and that by a deed of partition between the said children, the said lots of land so acquired at Sheriff's sale by the said Ezekiel Hart, were allotted to the said Harriet Hart, the Respondent, and by reason whereof she became and was seized and possessed of the said lots of land as the only lawful owner and proprietor thereof ; that the Appellant had caused the said lands to be seized as belonging to the Defendant, and concluded that she, the Respondent, might be declared the owner and proprietor of the said lots of land, and that the seizure thereof by the appellant might be declared null and void.

Among the exhibits filed by the Respondent in support of her opposition were :

10. Deed of sale by Sheriff to the late Ezekiel Hart, dated 1st March 1814, of the lots of land above mentioned.

20. Deed of partition of the estate of the late Ezekiel Hart and *uxor*, passed before LaBarre, and colleague, shewing that the said lands had been allotted to the Opposant.

3. Copy of a judgment homologating the said deed of partition.

4. Act of renunciation by Opposant, and six others named, to the succession of Ezekiel Hart, 11th October, 1844.

This Opposition was met by an answer setting forth that the Sheriff's deed to Ezekiel Hart did not convey any right of property to him, because Oliver Barker, named as Defendant in the suit of Hart vs. Barker, was not at the time of the adjudication, and had not for eleven years previous thereto, been proprietor or possessor of the lots in question, or of any of them ; all which lots, at and previous to the adjudication had been, as the late Ezekiel Hart then well knew, the property and in the possession of Samuel Hickok, of Burlington, Vermont, from whom the Defendant acquired the lands by deed of the 16th September, 1847, passed before

Jobin and colleague, notaries, produced and filed. The Plaintiff then proceeded to set forth a deed of sale of the 23d May, 1803, passed before Prevost and colleague, notaries, from Oliver Barker to Samuel Buel, and a deed of sale of the said lots from the said Buel to the said Hickok, before Barbeau and colleague, notaries, dated the 19th January, 1807. That after the deed from Barker to Buel, Barker had neither title to nor possession of any of the said lots, of all which Ezekiel Hart, at the time of the alleged adjudication was well aware, but notwithstanding such knowledge caused the lands to be taken in execution as belonging to Barker, in order to become the purchaser thereof by Sheriff's sale, and that if the lands were delivered to the Sheriff by Barker, it was done by connivance between him and Hart, and that the latter might become the purchaser. The Plaintiff then alleged that the *partage* referred to did not convey to the Opposant any title to the lots in question, inasmuch as, in so far as relates to the lands, it derived all its validity from the alleged Sheriff's deed which was null and void. The Plaintiff therefore prayed for the dismissal of the opposition. The Plaintiff pleaded : 2. a *défense au fonds en fait*. Issue having been joined by a general replication. Three witnesses were examined on behalf of the Plaintiff, but no one could establish any tradition to or possession by Buel or Hickok, prior to the Sheriff's sale to Ezekiel Hart, and on the 30th August, 1849, the following judgment was rendered. Present : D. MONDELET, GAIRDNER and AYLWIN, Justices.

The Court, &c., considering that immediately before the time of the adjudication of the said lot of land to Ezekiel Hart, and of the giving and granting to him by the Sheriff of the District of Three-Rivers a deed of sale for the same, Oliver Barker, upon whom the said lot was seized, was the possessor of the same, the sale of the said lot by the said Oliver Barker to Samuel Buel not having been followed by

tradition ; it is considered that the opposition of the said Harriet Hart be and the same is hereby maintained, with costs against the Plaintiff, *Dissentiente* Aylwin, Justice.

It is from this judgment that the Plaintiff instituted an appeal, and he submitted, that inasmuch as the Opposant grounded her right to the land in dispute on her being one of the heirs of her mother, and on an alleged *partage* between her co-heirs, and S. B. Hart as accepting the succession of his father, it was incumbent on her to prove the allegations of her opposition in relation to these points ; and that the recitals contained in the deed of *partage* might be sufficient as against the parties to that deed, but not as against the Plaintiff, in relation to whom the *partage* was *res inter alios acta*, and therefore not establishing, as against him, the marriage of Ezekiel Hart and wife, their death, and the quality of the various parties to the *partage* as heirs.

The Plaintiff contended also that *tradition*, if at all necessary in the case of wild lands, is to be proved by a Plaintiff or Opposant claiming lands under a title. The Defendant setting up an adverse title, (or as in this case his creditor having an interest to support such title) must be taken to have been in possession at the time of the seizure. The opposition contained no allegation that Parker was not in possession, it rather took for granted his possession, but not as proprietor. It was in effect a demand *au pétitoire* in which the Defendant's possession is assumed, and the Opposant's right is alleged as that of a proprietor with a perfect title, including tradition or something equivalent to it. Had Buel's deed from Barker been made subsequent to the Sheriff's to Hart, Hart or his representatives might perhaps have invoked the Sheriff's title as sufficient to sustain his action, even against a Defendant admitted to be in possession, in such a case the possession might be supposed to have passed by the adjudi-

cation, and the Defendant's possession under such subsequent deed looked upon as a possession without title. But to presume Barker to have been proprietor as well as in possession, notwithstanding the production of a deed to Buel, prior to the seizure, would be to carry the doctrine of presumption very far indeed. It would be in effect to give the *adjudicataire* all the rights the *saisi* would have had in case the prior deed had not existed. It would give to a *décret* of waste and uncultivated forest lands, sold previous to the *décret*, the same effect as under the most rigorous doctrine of the old laws, could have been claimed for it in case of a defendant living upon and cultivating lands as the ostensible proprietor. It would enable the Plaintiff who must be supposed cognizant of the facts to invoke the protection which was claimed by many of the old french writers, and in numerous cases given by the Courts to *adjudicataires* who in good faith became purchasers at judicial sales of lands openly possessed by Defendants, and which were sold after all the formalities of the *saisie réelle* had been complied with, and this too, without producing any proof of the regularity of the proceedings, on which his title is founded, although put *en demeure* to produce them by the contestation of the Plaintiff.

Authorities cited by Respondent. (1).

Sir JAMES STUART, Baronet, Chief Justice :—This is an opposition *afin de distraire* by which the Respondent, an Opposant, claims under a deed of partition, dated the 27th October, 1846, a certain immoveable in this cause seized.

(1) 5 Cochin pp. 11, 401, 404 :—Pothier de la Propriété, pp. 251, 252 :—4 Cochin, p. 159 :—Pothier Tr. de la Vente, Nos. 630, 654 :—3 Cochin p. 401 :—8 Toullier Nos. 148, 150, 156, 161 :—Pothier, Obligations Nos. 738, 739 :—4 Toullier Nos. 55, 56 :—9 Toullier p. 115 note :—12 Wendell's Rep. pp. 631, 677 :—Pothier Tr. de la Propriété pp. 253, 324 :—3 Phillips No. 1237 :—Voët Tit. 4, No. 7 :—2 Phillips p. 674.

Merlin Répertoire Vbo. Tradition.

Lachaise, Expropriation forcée No. 413.

Troplong, Vente, No. 276.

8 Toullier Nos. 148, 150.

The question raised between the Appellant, Plaintiff, and the Respondent is as to the validity of a Sheriff's title, in a certain cause wherein Ezekiel Hart was Plaintiff, and one Oliver Barker was Defendant, and wherein the said Ezekiel Hart, the father of the Respondent, became the purchaser of the immoveable property in question. The Opposant claims that property as representing her mother, deceased. A Sheriff's title is most important, and ought not to be defeated, save and except in the case of the property having been seized *super non domino et non possidente*. The Plaintiff, who has contested this opposition, claims the property by virtue of a title from Barker to Buel, 1803, from Buel to Hickok, 1807, and from Hickok to Defendant, 1847. We are of opinion that in these several sales and transfers there was no tradition, and that Buel and Hickok have had no possession ; while we are of opinion that Oliver Barker was in possession at the time the property was sold upon him.

It has been objected that there is no proof of the heirship of the Opposant : this could not be taken advantage of by the general issue ; it ought to have been pleaded specially. The Sheriff's title must consequently be held good, and the judgment of the Court below confirmed.

The judgment in appeal is as follows :

The Court, &c., considering that the land in question in this cause, was, by the Sheriff of the District of Three-Rivers, legally seized and taken in execution under competent authority, and by the said Sheriff adjudged and sold in due form of law, on the 28th day of February, 1814, to the late Ezekiel Hart who became the purchaser thereof at the public sale made of the same, by the said Sheriff ; and considering that before and at the time of the said Sheriff's sale the said land was in a wild and uncultivated state, and was not in the visible or actual possession or occupation of any person as proprietor thereof ; and considering also that there is no

evidence in this cause to establish that, after the sale of the said land by Oliver Barker to Samuel Buel, on the 23d May, 1803, or after the sale of the said land by the said Samuel Buel to Samuel Hickok, on the 19th May, 1807, either the said Samuel Buel or the said Samuel Hickok, became or was in any manner possessed of the said land, under and in pursuance of the said last mentioned sales, or either of them, at any time before the said Sheriff's sale to the said Ezekiel Hart, or at the time the same took place ; and considering, therefore, that the said land was legally seized and taken in execution and sold by the said Sheriff to the said Ezekiel Hart, as being the land of the said Oliver Barker, and considering that the right of property in the said land thus acquired by the said Ezekiel Hart, hath passed from him and became vested in the said Harriet Hart, under and by virtue of the deed of partition in the opposition *afin d'annuler* of the said Harriet Hart, in this cause, in the Court below, filed, mentioned ; and considering, therefore, that the said opposition of the said Harriet Hart was and is well founded, and that in the maintaining of the same by the Court below, there is no error ; it is by the said Court now here adjudged, that the judgment appealed from, be and the same is hereby in all things affirmed, with costs to the said Respondent against the said Appellant.

ROBERTSON, A. and G., for Appellant.

STUART, H. for Respondent.

QUEEN'S BENCH. } DISTRICT OF MONTREAL.
 APPEAL SIDE. }

Before SIR JAMES STUART, Baronet, Chief Justice, and
 ROLLAND, PANET and AYLWIN, Justices.

VONDENVELDEN,..... *Appellant.*
 and

HART and AL.,..... *Respondents.*

The validity of a contestation to a report of distribution, by which the claims of a *baillieur de fonds* were passed over, being called in question, and the Court pronouncing its validity, held per SIR JAMES STUART, Baronet, Chief Justice, that the *baillieur de fonds*, either anterior or posterior to the Ordinance of the 4th Vic. Cap. 30, is bound to enregister his title.

La validité d'une contestation d'un rapport de distribution, dans lequel les réclamations d'un *baillieur de fonds* ont été omises, étant mise en question, et la cour rejetant cette contestation comme irrégulière, jugé par SIR JAMES STUART, Baronet, Juge-en-Chef, que le *baillieur de fonds*, soit antérieur soit postérieur à l'Ordonnance de la 4e Vic. c. 30, doit enregistrer son titre.

Judgment rendered the 29th July, 1852.

This appeal was brought from a judgment of the Superior Court, sitting at Montreal, rendered on the 2nd day of December 1851, dismissing the contestation filed by the Appellant, Opposant in the Court below, to the Report of distribution and collocation made and filed by the Prothonotary of the late Court of Queen's Bench for the District of Montreal, and from the homologation of the said Report subsequently obtained by the Respondents, Plaintiffs and Opposants in the Court below, on the 22nd day of December 1851.

The Sheriff of the District of St. Francis, under an execution issued at the suit of the Respondents, against the lands and tenements of their debtor, François B. Blanchard, the Defendant in the cause, had sold by distress, certain lots of land in the Township of Kingsey, possessed by and belonging to the said Defendant, and had returned the proceeds of the said real estate, amounting to the sum of £78 17s. 4d. currency, into Court, to be distributed.

Upon the return of these monies, the Respondents filed an Opposition *afin de conserver* for the sum of £370 8s. 3d. currency, founded upon a Judgment obtained by them in the Court of King's Bench for the District of Montreal, on the 18th of October 1838, against the said Defendant, François B. Blanchard, and another, jointly and severally, duly registered on the 27th of December 1842, in the Registration District of Nicolet, within which the above mentioned lots of land were situated, and creating and bearing by law, and in virtue of its said registration a right of mortgage over the same for the payment of the said sum.

The Appellant also filed an Opposition *afin de conserver* in the cause ; his reasons of Opposition set forth, that he had sold, by different notarial deeds of sale, passed in and before the year 1836, the said lots of land, seized and sold in execution in the cause, to certain persons mentioned and described in his Opposition for the various sums therein specified, and that as the vendor of the said real estate, he was entitled to be collocated on the monies arising from the sale thereof, under his privilege of *bailleur de fonds*, in preference to all other hypothecary creditors.

By a Report of distribution and collocation, filed in the cause the 5th July, 1848, the Respondents had been collocated for the sum of £67 19s. 1d. currency, on account of the sum claimed by them in their Opposition, to the exclusion of the Appellant.

On the 10th July, 1851, the Appellant filed a contestation to this Report, alleging for reasons of contestation, that the Report was irregularly obtained ; that the Respondents' Opposition had been filed after the expiration of the delay prescribed by the Rules of Practice, and without the knowledge of the Appellant ; and, in fine, that the Appellant's claim, as founded on a privileged right of *bailleur de fonds*, should have been preferred to the hypothecary claim of the Respondents.

Issue was joined on this contestation by a general answer.

The cause, after having been inscribed by the Appellant for hearing on the merits several times, was finally argued and heard on the 1st of December 1851, without any *Enquête* having been made by the Appellant, and on the 2nd the Court rendered judgment, rejecting the contestation with costs.

On the 22nd December, 1851, upon a motion made by the Respondents the Court rendered Judgment, homologating the report of distribution and collocation filed in the cause on the 5th July, 1848.

It is from this Judgment, and from that of the 2nd December last, rejecting the Appellant's contestation, that the appeal had been instituted.

The question submitted to the Court below was, whether the Appellant, who had neglected to register his claims over the said lots as vendor, could exercise his privilege of *bailleur de fonds*, to the prejudice of the Respondents who had duly registered their hypothecary claim within the period prescribed by law.

The Respondents contended that the Vendor of a Real Estate, or *bailleur de fonds*, who had neglected to register a deed of sale anterior to the passing of the Registry Ordinance, 4 Victoria, Chapter 30, on or before the 1st November, 1844, the period limited for the registration of old deeds, could not claim to the prejudice of subsequent hypothecary creditors, whose titles have been duly registered before him, as the Law specially required the formality of registration within the said period, to preserve such privileged claims in their full force and effect, against all subsequent hypothecary creditors. (1)

(1) 4 Vic : ch. 30, Secs. 1, 3, 31 :—7 Vic. ch. 22, Sec. 12.

has been produced by the want of security against the privilege of the vendor, and a remedy for the evil is loudly called for.

ROLLAND, Justice :—Upon this question, (the registration of the privilege of the vendor,) three of our Courts have already been divided ; however, a majority has decided in favour of the non-registration. But to-day, in this Court, we have, for the first time, the opinion of the Chief Justice upon the matter. I hold that the point does not arise in this case, because the contestation of the Appellant is so informal that it must be dismissed as inadmissible ; so that the question of registration cannot be determined. However it is time that the Legislature should interfere, and put an end, by a declaratory Act, to the uncertainty arising out of this diversity of opinion.

Sir JAMES STUART :—It is proper for me to state why I thought it my duty to give an opinion upon this point. Although the contestation is imperfect and irregular, still it contains sufficient allegations to ground the claim of privilege as *bailleur de fonds*, which is all that is required under the system of pleading in this country. Entertaining this opinion, it was my duty to examine the validity of this claim, and deeming it unfounded for want of registration of the privilege claimed, I concur for this reason in confirming the judgment by which the contestation was overruled.

AYLWIN, Justice :—I am of opinion that the proceedings of the Appellant are so irregular and imperfect that they cannot be tolerated, and that his contestation must be struck from the files, and for that reason I say that the question of registration does not arise in this case. However, as the Chief Justice is of opinion that the allegations of the contestation were sufficient to enable him to discover what the Appellant intended to claim, I think it was his duty to give his opinion upon this important point, and knowing the

weight due to that opinion, the expression of it cannot but do good. (1)

PANET, Justice :—There is upon this point a settled jurisprudence, by which it has been determined that inasmuch as no delay has been granted to the vendor to register his claim, it is impossible to carry out the law, and declare that his privilege shall be lost for want of registration. The difficulty arises from the fact that the registry laws apply to general mortgages created before the ordinance and to special mortgages subsequent thereto. If the privilege of the *bailleur de fonds* was regulated by the registration, a moment must necessarily occur during which such general mortgages should affect the property sold to the prejudice of the vendor, which cannot have been the intention of the Legislature. The majority of the Judges have decided that such privileges cannot be lost by the want of registration, and it is now the jurisprudence.

Judgment confirmed.

The Court, &c., considering that the paper writings docketed and marked as a contestation, by the Appellant, of the Report of distribution and collocation, which was homologated by the Court below, on the 13th day of December, 1851, was wholly informal and insufficient to raise an issue of law between the Appellant and the Respondent, on which the *privilege de bailleur de fonds*, claimed by the Appellant, might have been tried and adjudicated upon ; And that in the judgment of the Court below rejecting the said contestation, so styled, there is no error ;

(1) In the case of Wilson and Atkinson, ante p 5, Mr. Justice AYLWIN, dissenting from the majority of the Court, expressed an opinion in entire accordance with that of the Chief Justice in this case. It is true that, in the present case, the privilege of the vendor is anterior to the ordinance 4 Vict., C. 30, but the opinion of the Chief Justice applies to all privileges of *bailleur de fonds*, whether anterior or posterior to the ordinance. See 4 V., C. 30, S. 1, 4 and 31, and 7 V., C. 22., S. 12:—1 L. C. Rep. pp. 3, 4, 5.

And considering, that after the rejection of the same, no legal contestation was offered by the Appellant to the Prothonotary's report of distribution, and that in the ordinary course the same was duly homologated by the Court below, the Court here doth affirm the said judgment of homologation, and doth condemn the Appellant to pay to the Respondents the costs by them incurred in this behalf, as well in the Court below as in this Court, &c.

VONDENVELDEN, for Appellant.

JUDAH and WURTELE, for Respondents.

QUEEN'S BENCH, } DISTRICT OF QUEBEC.
APPEAL SIDE. }

Before SIR JAMES STUART, BARONET, Chief Justice, and
ROLLAND, PANET and AYLWIN, Justices.

DINNING,..... *Plaintiff in the Court below,*
Appellant.

and

JEFFERY..... *Defendant in the Court below,*
Respondent.

Held, that a guardian of goods and chattels seized under a Writ of Revendication addressed to the Sheriff, has a right of action as well against the party at whose suit the Writ issued, as against the Sheriff, for the recovery of the monies expended by him as such guardian in and about the safe-keeping and custody of such goods and chattels

Judgment of the Superior Court at Quebec, reversed.

Jugé, qu'un gardien d'effets saisis au moyen d'un Writ de Revendication adressé au Shérif, a son action aussi bien contre la partie qui a fait émaner ce Writ que contre le Shérif, pour le recouvrement de ses dépenses encourues comme gardien pour la conservation des dits effets.

Jugement de la Cour Supérieure de Québec, infirmé.

Judgment the 29th July, 1852.

This Appeal was instituted from a Judgment of the Superior Court, sitting at Quebec, (1) maintaining a demurrer

(1) *Vide ante* p, 118, where the case before the Superior Court is fully reported.

filed by the Respondent to the first count of the Appellant's declaration.

IRVINE, for Appellant : By the law of France the *gardien* has a right of action against both the *huissier* and the *saisissant*. (1) The *gardien* can claim from the *saisissant* the necessary funds for the safe-keeping and custody of the effects seized. (2) By our Provincial Statute(3) the Sheriff could not refuse to accept a guardian, and, having accepted him, he is thereby exonerated from responsibility. It is only in the case of seizures of rafts that the Sheriff can claim monies for the custody thereof from the party *saisissant* (4). It is not necessary that a *gardien* should be authorized in the first instance, to make disbursements, by the Court or by a Judge. If they become indispensably necessary, he should make them, and will be entitled to recover the same, if he can justify the expenditure (5). Now this could only be done by means of an *Enquête*, of which the Appellant has been deprived by the judgment of the Court below.

POPE, for Respondent : A *gardien* has no right of action against the *saisissant*, unless he has been authorized *en justice* to incur the disbursements which he seeks to recover. The authority cited by the Appellant from Jousse, establishes this proposition, for it reads thus : " Quand il y a des frais " de nourriture ou autres A AVANCER pour la garde et entretien des effets saisis, le gardien peut demander " au saisissant qu'il lui soit fourni des deniers à cet effet, " sinon il peut demander à être déchargé de la garde." (6).

(1) Il a action, pour en être payé, contre l'huissier qui l'a établi et contre le saisissant à la requête de qui il est établi. Poth. Prov. Civ. pp. 182, 183.

(2) 2 Jousse Com. Ord. 1667, Tit. 33, Art 10, S. 2.

(3) 6 Wm. IV, Cap 15, Sec. 9.

(4) *Ibid*, Sec. 23.

(5) Serpillon Code C. p 299.

(6) *Vide* note 2.

The Ordinance of 1667, Tit. XIX, Art. XII, declares that, " Les réparations et autres impenses nécessaires aux lieux " séquestrés, NE SERONT FAITES QUE PAR AUTORITÉ DE " JUSTICE, les parties dûement appelées, autrement elles " tomberont en pure perte à ceux qui les auront fait faire (1). The principle established in relation to the *séquestres* applies equally to *gardiens* (2). That *gardiens* should be duly authorized before they can institute actions, has been already decided. (3) The Appellant's declaration does not shew whether he was in law a *gardien* or a *dépositaire*. The former being offered by the *saisi*, his office is gratuitous (4). The latter is appointed by the *huissier*, at the instance of the *saisissant* (5). No salary is due to the former. The office of *gardien* is a necessary one, and he is entitled to payment upon his bill being duly taxed, (6) which has not been done in this case. The fact of an individual being either a *dépositaire* or a *gardien* makes most important differences, not only as regards payment, but also concerning the liabilities of the *saisissant* or *saisi* (7) and yet the declaration is silent as to the party by whom the Appellant was appointed. The first authority, cited by the Appellant, has no application to the present case, or, if it does apply, it is adverse to him. (8) In that it admits the responsibility of the *saisissant* or *saisi* to the *huissier*, according as either may have appointed the *gardien*. It merely relates to the salary or pay of a *gardien*, whereas the Appellant's action is for neither, but for disbursements made. If it is applicable, then the bill should have been taxed previously. Had the Appellant been ap-

(1) 1 Jousse, loc. cit.

(2) 1 Jousse Com. Ord. Tit. 19, Art. 15, sec. 4.

(3) Rep. de Jurisp. Vbo. " Gardien." p. 126.

(4) Poth. Proc. Civ. Part 4, Chap. 2, Art. 5, S. 1.

(5) *Ibid.*

(6) *Ibid.*

(7) *Ibid.*

(8) Le Gardien doit faire taxer ses salaires par le Juge, il a action pour en être payé, etc. (*ante*. note 2) l'huissier en doit être acquitté par le saisissant ou par la partie saisie.

pointed guardian at the instance of the Respondent, the position of the latter might have been different from what it is, for, in that case, a contract would have been formed between the *saisissant*, the *saisi* and the *gardien*, in respect of which certain liabilities would have attached to the former. As the claim is for disbursements, it is fairly to be presumed that the Appellant was a *gardien volontaire* or *dépositaire*, and, in such case, the contract is solely between him and the party who appointed him, namely, the *saisi*. Had the latter obtained *main-levée* of the seizure, he could have had no action against the *saisissant* for an account of the effects seized, nor for their production, he would have had his action solely against the *dépositaire*, whom he had himself chosen (1), as the contract was solely between them, and if it was, how could the *dépositaire* claim payment from the *saisissant* who had never any thing to do with him? How render the latter responsible for the payment of disbursements to an utter stranger, when he is not even liable to the *saisi*, whose effects have been seized? The Provincial Statute, cited on the other side, is in favor of the Respondent, for it invests the Sheriff with the liabilities of *gardiens* as they obtained in this country before 1759 (2). The 22nd section of that Statute empowers the Sheriff to exact a bond of indemnity before proceeding on a writ of revendication to attach rafts and timber. In this case several rafts and a large quantity of timber were alleged to have been seized. It is therefore evident that the Sheriff alone was the party to whom the Respondent is liable. The 23rd section expressly introduces the system pursued under the Ordinance of 1667, for it enacts that the Sheriff shall be authorized to demand and receive, in advance, from the Plaintiff, such sum as may by any one of the Judges, &c., be deemed sufficient for the safe-keeping of the raft or timber, to be seized under a writ

(1) Poth. Cont. de dépôt n. 195.

(2) 6 Wm. IV, Cap. 15, Sec. 9.

of revendication. *Similar* pretensions to those of the Respondent were maintained in a case of some importance (1). Had the Sheriff sued the Respondent, it would have been no answer in law that he had already paid the *gardien*, since such sum clearly formed part of the Sheriff's assets, and could have been claimed as such had he become a bankrupt, nor in the action in the Court below could the Respondent make the Sheriff a party to the suit. The authorities, on the other side, merely say, that "le *gardien* a pour ses *salaires* une action contre le *saisissant* et contre l'*huissier* même qui l'a établi ;" but the distinction between the cases is too apparent not to shew that they are inapplicable in the cause before the Court, for it supposes the case of a *gardien*, who must be appointed by the *huissier*, at the instance of the *saisissant*, in which case a contract would have been called into existence ; whereas the present action is for disbursements made by a *dépositaire* offered by the *saisi*, no contract having been made in which the Respondent intervened.

SIR JAMES STUART, Bart. C. J. :—The question in this cause is, whether a guardian to a seizure can bring his action directly against the Plaintiff, who has caused the seizure to be issued, and for whose benefit the guardianship has taken place, to be paid his salary and disbursements as such guardian. We are of opinion that the declaration shows a sufficient cause of action, and that the Plaintiff's action ought not to have been dismissed upon a demurrer. The Court below has held, that the guardian has no action against the party who had taken the seizure, and could only bring his action against the Sheriff who had constituted him guardian. We hold that the guardian had his recourse against both, and our opinion is based upon an authority to be found in *Nouveau Dénizart, verbo Gardien*, where it is stated that such an

(1) Stuart's Repts. p. 75.

action may be brought against the party or against his *huissier* represented here by the Sheriff. In consequence we reverse the judgment of the Court below, and send back the parties to proceed further before the said Court.

The judgment of the Court below (present BOWEN, Chief Justice, and DUVAL, Justice,) is as follows :—

The Court, &c., considering that in the first count of the Plaintiff's declaration it is alleged, that the said Plaintiff was named guardian of divers goods, chattels and effects seized by the Sheriff of this District, in virtue of a Writ of Revendication issued at the suit of James Jeffery, the Defendant in this cause, against John Shaw and Richard Jeffery ; and that there is due and owing to the said Plaintiff, James Dinning, as such guardian, a sum of two hundred and fifty pounds currency, for the custody and safe-keeping of the said goods, chattels and effects, while under seizure in virtue of the aforesaid Writ of Revendication, for the recovery of which sum this action is brought ; and considering that the said Defendant is responsible to the Sheriff of the District, to whom the said Writ was addressed as well for the payment of the fees allowed the said Sheriff, as for the payment and reimbursement of all expenses and disbursements incurred by the said Sheriff in the execution of the said Writ ; and that by reason thereof, the Defendant is not bound to pay to the Plaintiff the amount by him claimed as such guardian, doth maintain the demurrer in this cause filed by the Defendant, and doth declare that the allegations set forth in the first count of the said declaration, and the matters and things therein contained, in manner and form as the same are stated and set forth in the said first count, are not sufficient in Law to entitle the said Plaintiff to have or maintain his action against the said Defendant, for the recovery of the sum of money in the said first count alleged to be due and owing by

the Defendant to the Plaintiff, and in consequence doth dismiss the said first count of the Plaintiff's declaration, with costs.

The judgment in Appeal is as follows :—

The Court of Queen's Bench, &c., considering that a legal cause of action by the Appellant against the Respondent, is set forth and contained in the first count of the declaration of the Appellant in this cause, in the Court below, and that the demurrer or *défense au fonds en droit*, of the Respondent to the said first count, has been erroneously by the Court below, maintained, and thereupon, the action of the Appellant erroneously dismissed, as respects the said first count ; It is, by the said Court, now here, adjudged, that the judgment appealed from, namely, the judgment of the Court below in this cause rendered, on the seventeenth day of December, one thousand eight hundred and fifty-one, be and the same is hereby reversed, annulled and made void, and the said Court, now here, proceeding to render such judgment in the premises as by the said Court below ought to have been rendered. It is, by the said Court now here, further adjudged that the said demurrer, or *défense au fonds en droit* of the Respondent, in this cause, filed in the Court below, be and the same is hereby overruled with costs : and that such other and further proceedings be had, in this cause, in the Court below, as to law and justice, may appertain, And it is further, by the said Court, now here, adjudged that the said Appellant do recover his costs in this suit in Appeal, from and against the said Respondent :

HOLT and IRVINE, for Appellant.

POPE, for Respondent.

COUR DE CIRCUIT.—QUEBEC.

Présent : DUVAL, Juge.

No. 1837 { PETIT.....Demandeur,
 de { vs.
 1852. { BÉCHETTE.....Défendeur.

Jugé, qu'un père ne peut porter une action pour son fils mineur comme son tuteur naturel, ni maintenir sa propre action, s'il l'a jointe à celle portée pour son fils en telle qualité.

Held, that a father cannot sue for his minor child as his natural tutor, nor maintain his own action, if he has joined it to that brought for his son as such natural tutor.

Jugement le 30 juillet, 1852.

L'action était portée par le Demandeur, tant en son nom que comme tuteur naturel de son fils mineur, en dommages pour assaut et faux emprisonnement par le Défendeur sur le fils mineur du Demandeur.

Le Défendeur plaida, par une exception à la forme, que le Demandeur ne pouvait porter l'action pour son fils comme son tuteur naturel, qu'il devait se faire nommer tuteur en justice, et qu'il ne pouvait exercer l'action qu'il avait en son nom avec celle de son fils, en qualité de tuteur naturel de ce dernier. *Per curiam* : Le père ne peut porter l'action pour son fils mineur comme tuteur naturel de son enfant. Dans notre système, il n'y a que des tutelles datives. Quant à l'action qu'il a en son nom, elle ne peut être maintenue en la présente cause, parcequ'il l'a jointe à celle qu'il a portée erronément en qualité de tuteur naturel, car il serait impossible de distinguer quant aux dommages dus à l'un et à l'autre.

L'exception à la forme est maintenue, et l'action déboutée.

TESSIER et TESSIER, pour le Demandeur.

LELIEVRE et ANGERS, pour le Défendeur.

SUPERIOR COURT.—QUEBEC.

Before DUVAL and MEREDITH, Justices.

No. 350	{	KELLY.....	Plaintiff,
of		FRASER.....	Defendant,
1852.		DIVERS.....	Opposants.

A contestation raised between two Opposants forms a distinct issue *quoad* such parties.

All documentary evidence, relative to the issues raised by such contestation, must be filed by such Opposants, and it is not sufficient that such evidence be already filed by other parties to the record.

Une contestation liée entre deux Opposants dans une cause est une contestation distincte quant à tels Opposants.

Toute preuve écrite, ayant rapport à telle contestation, doit être produite par les Opposants, et il ne suffit pas que tels documents aient déjà été produits par d'autres parties dans la cause.

Judgment 20th July, 1852.

Jellard and Connolly were both Opposants *afin de conserver*. The latter contested the opposition of the former. In his plea of temporary exception *péremptoire en droit*, he alleged three several notarial deeds on which his contestation was founded; one only of these was filed with his plea, the other two were alleged to have been already filed of record in the cause by other Opposants.

A demand of answer to plea having been made, and no issue having been joined within the delay required, Jellard was foreclosed by Connolly from the right of answering the plea, and the latter obtained a rule *Nisi* to dismiss the opposition of the former. Thereupon Jellard moved to strike the foreclosure from the files, as the two deeds in question had not been filed by Connolly with his plea, as required by the Rules of Practice (Rule 24), and that in consequence Jellard was not yet bound to answer (Rule 26).

Judgment granting Jellard's motion; Connolly's rule discharged; the Court observing that the contestation was a distinct issue between the Opposants, and could not be supported by evidence adduced between other parties.

O'FARRELL, for Connolly.

POPE, for Jellard.

SUPERIOR COURT—MONTREAL.

Before SMITH, VANFELSON and MONDELET, Justices.

No. 510 { SIR JAMES STUART, Bart. et ux,..... *Plaintiffs.*
of { vs.
1851. { BOWMAN,..... *Defendant.*

Held,—1. That the English Civil Laws have not been introduced into Lower Canada by the Proclamation of 1763, or the Imperial Act (Quebec Act) of 1774 : 2. That by the Imperial Act 6 Geo. IV, chap. 59, the English Laws have only been introduced into Lower Canada, in respect of lands held in free and common socage, in the particulars of conveyance, descent or inheritance and dower : 3. That in order to acquire a valid title to real estate, there must be an actual delivery (*tradition*) : 4. That to acquire a title by prescription under the French Law, there must be an absolute physical possession (*possession naturelle*.)

Jugé,—1. Que le Droit Civil Anglais n'a pas été introduit dans le Bas-Canada par la Proclamation de 1763, ni par l'Acte Impérial (l'Acte de Québec) de 1774 : 2. Que par l'Acte Impérial de la 6me Geo. IV, cap. 59, les Lois Anglaises n'ont été introduites dans le Bas-Canada, par rapport aux terres tenues en franc et commun socage, que dans les cas où il s'agit de ventes, ou cessions, successions ou douaires : 3. Que pour obtenir un titre valable quant aux propriétés immobilières il faut qu'il y ait tradition réelle : 4. Que pour acquérir au moyen de la prescription, sous l'empire du Droit Français, la possession naturelle est nécessaire.

Judgment rendered the 26th March, 1851.

This was a petitory action brought by the Plaintiffs against the Defendant, to recover the possession of two lots of land (Nos. 11 and 12, in the second range of lots in the township of Buckingham, in the District of Montreal,) with the rents, issues and profits thereof.

The action was instituted in February 1835 ; the declaration of the Plaintiffs contains 12 counts, and sets forth the title of the Plaintiffs in a variety of forms to meet the law of the case, whether the question is to be determined by the english law or the french law.

The facts of the case, as detailed in the several counts of the declaration, may be succinctly stated as follows :

That on the 29th May 1799, by Letters Patent, under the Great Seal of the Province, His Majesty Geo. III, granted to

John Robertson, then an Ensign in His Majesty's late 84th regiment of foot, several tracts or parcels of land containing together about 2000 acres of land, situate in the township of Buckingham, in the District of Montreal, being lots Nos. 9, 10, 11, 13, 14, in the first range of lots, and the Nos. 9, 11, 12, 13 and 15, in the second range of lots, to be holden in free and common soccage. That John Robertson entered into possession and so remained until the 15th October 1804, on which day a sale thereof was made before Chaboillez and colleague, Notaries, by Catherine Christie, the wife of John Robertson, and one William Martin, as the joint attorneys of the said John Robertson, duly authorized thereto by Power of Attorney, bearing date the 5th day of April 1800 ; that the sale so made was made to Patrick Robertson, a brother of John Robertson, and to Francis DesRivières in his quality of tutor to certain minor children therein named, to wit, Elizabeth Robertson and Catherine Robertson, for and in consideration of the sum of £833 6 8 current money of the Province. That the said minor children, so represented by the said Francis DesRivières, their tutor, were the children lawfully begotten of one Alexander Robertson (also a brother of John Robertson and Patrick Robertson,) and one Mary McPherson, his wife, and were the co-heiresses of the said Alexander Robertson ; that by this deed of sale, the said Patrick, and the children and co-heiresses of the said Alexander Robertson, represented by their tutor aforesaid, became the owners and proprietors of the said 2000 acres of land, and held and enjoyed the same ; that Patrick Robertson aforesaid, on the 16th March 1808, died, and the said Elizabeth and Catherine Ann survived him. That Catherine Ann died on the 18th January 1814, and that Elizabeth Robertson, the sole survivor, afterwards married James Stuart on the 14th March 1818 ; that when Patrick Robertson died on the 16th March 1808, he left one Niel Robertson, his eldest brother, his heir at law, who afterwards died on the 18th

June, 1813, leaving an only daughter Elizabeth Ann Robertson, who died on the 6th August 1823. That John Robertson, the original patentee from the Crown, died in Jamaica, in the West Indies, in 1815.

The title of the Plaintiffs, arising out of these facts, is set out in the declaration in several ways : and firstly, it is set out in the first count of the declaration—That by the sale from John Robertson, by the ministry of Catherine Christie, his wife, and William Martin, as his duly authorized Attorneys, to Patrick Robertson and Francis DesRivières, in his quality of tutor to the minor children, Elizabeth and Catherine Ann Robertson, children of Alexander Robertson and Mary McPherson, his wife, the said Patrick and Elizabeth, and Catherine Ann became and were joint tenants of the said 2000 acres of land, each for one half ; that by the death of Patrick and the survivorship of Elizabeth and Catherine Ann, the latter became jointly, as such survivors, the owners and proprietors of the whole 2000 acres of land, and the entire tenancy vested in them ; and that by the subsequent death of Catherine Ann the entire tenancy of the said 2000 acres of land vested in Elizabeth Robertson, as sole survivor.

This is substantially the title set up by the first count of the declaration, by which the said Elizabeth Robertson claims the entire property in the 2000 acres as sole survivor of the original purchasers of the land from John Robertson, which purchase operated as a conveyance by joint tenancy, and that by the law of the land, applicable to such cases, Elizabeth Robertson, as sole survivor of the joint tenants, became legally seized, in her own right, of the entire 2000 acres.

The title of the said Elizabeth Robertson secondly invoked and set out in the 2nd count of the declaration is deducible in a different way, and based on principles of law different from those invoked in the first count, and is as follows :

That by virtue of the Sale by John Robertson, by his Attorneys as aforesaid, to Patrick Robertson and Francis Des Rivières, tutor as aforesaid to Elizabeth and Catherine Ann, children of the said Alexander Robertson, they, the said Patrick and the said minor children, became possessed and were seized of the said land, as tenants *par indivis*, each for one half, that is to say, the said Patrick for one half or two fourths, and the said Elizabeth and Catherine Ann, for one half, or each for an undivided one fourth share. That by the death of Patrick without issue, his estate in the said undivided half passed and descended to his eldest brother Niel Robertson, who became seized thereof in his own right: That by the death of Niel, as aforesaid, the said two undivided fourth shares passed and descended to Elizabeth Ann Robertson, his only daughter and heiress, and that by the death of the said Elizabeth Ann Robertson on the 6th August, 1823, without issue, the said two undivided fourth shares passed and descended to her cousin Elizabeth Robertson, as the eldest and only surviving daughter of the said Alexander Robertson, the brother of Niel Robertson: That the said Elizabeth Robertson, thereby became possessed and seized, as in her own right, of three of the undivided fourth shares of the said 2000 acres, and that by the death as aforesaid of Catherine Ann, her sister, the one undivided fourth share, so belonging to the said Catherine Ann, passed and descended to her the said Elizabeth, as sole heiress at law of the said Catherine Ann, she having died without issue, whereby the said Elizabeth Robertson became possessed and seized, in her own right, as proprietor, of the entire 2000 acres of land.

The title thus invoked in the second count is traced down to the said Elizabeth Robertson, assuming that by the purchase aforesaid, Patrick and Elizabeth, and Catherine Ann, became tenants *par indivis* of the 2000 acres, and that as regards the one undivided half or two fourths so acquired by Patrick, the said two fourth shares passed by inheritance to

Elizabeth Robertson as sole heiress at law to Patrick, the original co-purchaser, by regular descent, and to the one fourth share of Catherine Ann, as her sole heiress at law.

The third count of the declaration sets out the case as in the second count, with this difference solely, that supposing, by the purchase aforesaid, the said Patrick Robertson and Elizabeth and Catherine Ann Robertson acquired as tenants *par indivis* for one third each, and not as stated in the second count, that is Patrick for two fourths and Elizabeth and Catherine Ann for one fourth each, that by the same course of descent and inheritance the one third share vested in Elizabeth as sole heiress at law to Patrick, her uncle, and as sole heiress of Catherine Ann, her sister, in the same manner as if they had acquired by one fourth shares, as stated in the second count.

The second and third counts are the only counts in the declaration which allege and claim a title, in the said Elizabeth Robertson, by estate of inheritance.

The fourth count of the declaration alleges a title in the said Plaintiffs, to the lots of land in question, founded on a prescription of 20 years by them the said Plaintiffs, and by all those whose estate the said Plaintiffs now have and claim, without interruption and in good faith.

The fifth count sets up the same title by prescription by a continued and uninterrupted possession of 20 years, but alleges the possession to have been in the Plaintiffs, generally, without reference to those from whom and through whom they acquired.

The sixth count sets up a title by prescription by means of a continued and uninterrupted possession of 30 years in good faith by the Plaintiffs, and by those whose estate they now have and claim.

The seventh count sets up a title in the Plaintiffs by prescription founded on a possession of 10 years, openly, publicly, peaceably, without trouble or molestation, *sans inquiétation*, and in good faith, with just title, as against all persons present of lawful age, and not privileged, and all other persons whomsoever, *entre âgés et non privilégiés*.

The eighth count sets out the same title by prescription, founded on a possession of 10 years with title, but alleging the possession to have been in the Plaintiffs, and all those whose estate they now have and claim.

The ninth count sets up a title by prescription, founded on a possession of 20 years by the Plaintiffs and their predecessors, openly, publicly, peaceably, and without trouble or molestation, *sans inquiétation*, in good faith, and with just title, as between the Plaintiffs and their predecessors, and all persons present of lawful age, and not privileged, *entre âgés et non privilégiés*.

The tenth count sets up the same title by prescription, founded on a possession of 20 years, but alleges the possession to have been in the Plaintiffs generally, without reference to their predecessors.

The eleventh count sets up a title in the Plaintiffs by prescription by reason of a possession of 30 years, continually, openly, publicly, peaceably, and without any trouble or molestation whatsoever, *continuellement, franchement, publiquement, et sans aucune inquiétation*.

The twelfth count sets up the same title by prescription, founded on a possession of 30 years, but it alleges the possession to have been in the Plaintiffs and in their predecessors, whose estate they now have and claim.

The Plaintiffs then allege the fraudulent possession and detention by the Defendant of certain portions of the 2000

acres of land, namely of the lots Nos. 11 and 12 situate in the second range of lots in the Township of Buckingham, containing 400 acres in superficies, and of his fraudulent and tortious entry thereupon on the 2nd August, 1833, and his refusal to deliver up the same, and of his drawing the rents, issues and profits thereof, and of damage by cutting timber, to wit, the damage of £2000 : and then follow the usual conclusions as in a petitory action.

To this action the Defendant pleaded a variety of peremptory exceptions, in the nature of demurrers to several of the counts of the declaration, together with various *defenses en droit* or demurrers to the declaration and action of the Plaintiffs. As these law issues were finally disposed of by an interlocutory judgment rendered on the 19th January, 1838, by which the whole were dismissed, it is unnecessary to refer to them.

The only portions of the Defendant's pleadings which it is necessary to notice, are the Peremptory Exceptions which were pleaded by the Defendant as his 15th, 16th, 17th, 18th and 19th pleas to the action, and the general denegation.

The first of these Exceptions alleges that on the 2nd August 1833, Catherine Christie, widow of the above mentioned John Robertson, being as his widow, and *commune en biens* with him, possessed, as proprietor of 3-6, and her three daughters, Catherine Margaret, Mary and Amelia, the first of whom was married to Philip Anglin, being as heirs of their father seized, as proprietors, of the remaining three sixths, sold the lots in question to the Defendant with a promise of warranty against all molestation, for the sum of £400 which was duly paid.

That the Deed given to the Defendant by Mrs. Robertson, and her daughters, was duly registered at Hull, in the County of Ottawa, and that under this deed he continued publicly,

peaceably, without interruption and in good faith, to hold and possess the said two lots of land, as the sole lawful proprietor thereof, until the time of the institution of the action.

That neither the Plaintiffs, nor any of the persons whose estate they pretend to have, ever entered upon, or took or had possession of the said lots of land, either under the pretended Deed of sale by John Robertson and Francis DesRivières or by any other, and that he, (the Defendant) being in possession of the property in good faith under a registered title, cannot be deprived of his right thereto.

The Exception 16thly pleaded is similar to the former, except that, in the latter, no reference is made to the title under which the Defendant's vendors held when they conveyed the land to him.

The 17th exception sets forth the fact of Mrs. Robertson and her daughters being proprietors of the lots in question; the sale by them to the Defendant, by Deed bearing date the 2nd August 1833; possession by the Defendant of the said lots before and ever since that time; and the payment by him of the purchase money (£400). The facts are alleged in the same manner as in the 15th exception, and the statement of them is followed by these averments. "That by the Provincial Statute 10th and 11th Geo. IV, chap. 8., it was enacted, "That "all Acts or Deeds in law, or instruments in writing, which "may convey, alienate, bind or affect, any immoveable property held in free and common soccage, or otherwise, within "the Counties of Drummond, Sherbrooke, Stanstead, Shefford "and Missiskoui, shall be duly enregistered, and that no "such Act, or Deed in law, or instrument in writing, shall be "binding or have any force or effect as a transfer, conveyance, mortgage, *hypothèque*, or incumbrance, until the "same shall have been so duly enregistered," which said provisions were afterwards by another Provincial Statute,

1st. Wm. IV. chap. 3, extended to all such lands and other immoveable property as, at the time of the last mentioned Act, were, or thereafter should be, held in free and common soccage in the Counties of Ottawa, Beauharnois and Megantic. That the said two lots of land, &c., were, at the time of the passing of the said last mentioned statute held in free and common soccage in the said County of Ottawa:— That the said Defendant, in pursuance thereof, &c., on the 15th August, 1833, caused the said deed of the 2nd August 1833, under which he had acquired the said lots, to be duly registered at the Registry Office for the County of Ottawa established under and by virtue of the said Statutes. That by the last mentioned Statute 1st. Wm. IV, chap 3, it was further enacted that from and after the passing of that Statute “no act or deed in law, or instrument in writing, by which
 “a Mortgage or *hypothèque* has been or is created, shall
 “bind or affect, as a Mortgage, incumbrance or *hypothèque*,
 “nor shall any Act, Deed or Instrument in Law, operate or
 “bind, as a conveyance, any land or immoveable property
 “situate within any of the said Counties of Ottawa, Beauhar-
 “nois and Megantic, save all such land or immoveable pro-
 “perty as is or may be held *à titre de fief* within the same,
 “unless the said Act, Deed or Instrument in Law, be enre-
 “gistered in the Registry Office for the County in which the
 “said land or immoveable property is situate, within one
 “year from and after the passing of this Act.”

That the said two lots of land were and are holden in the said County of Ottawa in free and common soccage, and not *à titre de fief*, and that the said Plaintiffs had not, nor had any one for them, caused the said pretended deed of sale of the 15th October 1804 to be registered according to law and to the said Statutes, &c. &c. within one year from and after the passing of the said last mentioned Statute, nor at any time before the said 15th day of August 1833, nor at any time after.

The 18th contains the same averments as the 17th—with the addition of the legal inferences to be drawn from the facts stated.

By the 19th plea, the Defendant claims to be paid the value of his ameliorations, in the event of Judgment being rendered against him.

The 20th and last plea, is a *Défense au fonds en fait*.

The answers pleaded by the Plaintiffs to these Peremptory Exceptions are : to the 15th, 16th, 17th and 18th :

1stly.—That they are insufficient in law. This demurrer was dismissed.

2ndly.—That they are unfounded in fact.

3rdly.—That Catherine Christie and her daughters were not, and the Plaintiffs were, seized and possessed, as proprietors, of the said two lots of land at the time of the date of the deeds of sale by the former to the Defendant, therefore they could not lawfully sell, &c.

4thly.—That long before and at the time when the said deed of sale was executed in favor of the Defendant, the Plaintiffs were lawfully seized and possessed of the two lots of land in question, and being so seized, the said Sir James Stuart “by reason of his being in the service of His (late) Majesty, and in the fulfilment of his duty as a Public Officer, “in such the service of His Majesty, was constrained, and “they the said Sir James Stuart and Elizabeth Robertson, “for divers just and lawful causes and considerations, were “constrained to depart from Lower Canada on the 1st of “May 1831, and the said James Stuart was compelled to “remain absent from the Province, in parts beyond the seas, “till the third October 1831.”

That the defendant and the said Catherine Christie, Philip Anglin and Catherine Margaret Robertson, Mary

Robertson and Amelia Robertson, taking advantage of the absence of the Plaintiffs, conspired together to cheat and defraud them, and in pursuance of such conspiracy agreed that the said Catherine Christie, Philip Anglin, Catherine Margaret Robertson, Mary Robertson and Amelia Robertson, should pretend to be the proprietors of the said two lots of land and that for certain colorable consideration for the land, should, by a deed of sale, convey the said lots to the Defendant; and should procure such deed of sale, so fraudulently obtained, to be registered in the office of registration for the County of Ottawa, whereby they expected to be able to defeat and destroy the title of the Plaintiffs to the said two lots of land. &c.

That the said deed of sale to the Defendant was executed and registered in pursuance of this conspiracy, and is therefore null and void in law.

5thly.—In this answer the conspiracy alleged in the previous answer is set forth in nearly the same manner;—the principal exception being, that instead of alleging, as in the former answer, that the Defendant gave the Robertsons none but a *colorable* consideration for the land in question, in this it is alleged that the Defendant obtained his deed from the widow Robertson, and her family, for a *corrupt consideration greatly below the real value* of the land and premises, &c.

6thly.—That at the time when the deed of sale pleaded by the Defendant was executed, he and his vendors well knew that the Plaintiffs were seized and possessed, as proprietors, of the lots of land in question, and that therefore the said deed is null, &c.

7thly.—That the Plaintiffs were compelled to leave Lower Canada for the service of the State, (as above alleged) and that within five weeks after the return of the said James Stuart, the deed of sale set forth in their declaration, and

bearing date the 15th day of October 1804, under which the Plaintiffs claim, was duly registered.

8thly.—That before and at the time of the execution of the deed of sale in favor of the Defendant, and before and at the time of the passing of the Provincial Statute relative to the establishment of Registry Offices in the County of Ottawa, and other Counties, the said Elizabeth Robertson was the true and incommutable proprietor of the lots of land in question, and they the Plaintiffs, in her right, were seized and possessed thereof.

9thly.—That the said Deed of Sale was obtained by the Defendant from Mrs. Robertson, and her family, through fraud and covin, and during the absence of the said James Stuart in the fulfilment of his duties as a Public Officer, and is therefore null and void.

10thly.—To the 24th exception. That the Defendant was not in possession of the said lots of land as the true and lawful owner thereof, but on the contrary, tortiously, fraudulently and illegally, without any title or right whatsoever, entered into and upon, and came into and acquired, the occupation of the said lots of land &c., and hath since held the same, in bad faith and in fraud of the Plaintiffs.

In answer to the Defendant's plea of general denegation, the Plaintiffs filed a general replication.

To all these answers the Defendant replied generally.

Issue having been joined upon these pleadings, the parties respectively proceeded to the adduction of evidence.

On the part of the plaintiffs, evidence both documentary and parole was adduced under the issues of fact in the cause. The parole evidence is contained in the depositions of twenty-six witnesses, and goes to establish that the tract

of land described in the Plaintiffs' declaration, had, for a long series of years, up to the time of the institution of the action in the cause, been known and distinguished as the "Robertson tract," that for a number of years prior to the year 1818, the said tract of land was under the care and management of one Daniel Sutherland, who was understood to be acting in the interest of certain minors of the Robertson family, or (according to some of the witnesses) as curator to the vacant estate of Patrick Robertson : that it was to Daniel Sutherland that, during this time, all applications were made respecting the sale of the said lands, and for permission to cut timber : that afterwards it was matter of notoriety in the Country that the said tract of land had become vested in James Stuart, by his marriage with Miss Robertson ; that at this time there were no settlers on the said tract of land, but that about the year 1819, one William Dunning went thereon as a squatter : and that about the year 1824, the defendant constructed a slide on part of the said land, and had ever since continued to occupy it for the use of his slide.

Dunning, in his deposition, spoke as to an interview he had had with Sir James Stuart some time between the years 1820 and 1822, that in consequence of that interview he went upon and occupied the said lots ; that in or about the year 1825, the Defendant commenced the building of his mills in the township of Buckingham, that after building the said mills, the Defendant spoke to him, (Dunning) of his desire to purchase lots No. 11 and 12 for the purpose of constructing slides ; upon this occasion, as well as on several other occasions, the defendant inquired of him to whom the said lots belonged, and he (Dunning) told him they belonged to Stuart, as having married Elizabeth Robertson ; that this had been and was common repute in the Townships : that this information was conveyed to the Defendant as early as the years 1827 and 1828 : that afterwards the Defendant told him that by

requiring that deeds executed *before* the passing of that statute, by which lands were sold or alienated, should be registered: the provision to this effect is that enacted for the first time by the 2nd section of the Act 1, Will. IV, c. 3, and this provision has not been extended to the County of Ottawa. That no such extension has been enacted by the Legislature, or has taken place, is also confirmed by the Act 2, Will. IV, c. 7. This Act was passed to enlarge the period within which registration might be made, and the enactment it contains is expressed as follows, viz: "That
 " the period assigned and limited by the said *second clause*
 " or *section* of the before mentioned Act, passed in the first
 " year of Her Majesty's reign, chapter the third, for enregist-
 " tering certain acts or deeds in law, or instruments in
 " writing in the *said clause* or section mentioned, shall be
 " and the same is hereby extended to the first day of May,
 " which will be in the year of our Lord 1833, and that *all*
 " *such* acts or deeds in law, or instruments in writing in the
 " said clause or section mentioned, and required to be enre-
 " gistered, which shall not be enregistered, in the manner
 " therein provided, before the first day of May, 1833, shall
 " be utterly void and of no effect whatsoever against sub-
 " sequent purchasers for a valuable consideration." By this Act the enlargement of time allowed for registration is expressly limited to the Counties mentioned in the *second* section of the Act 10th and 11th Geo. IV, c. 8, that is to the Counties of Drummond, Sherbrooke, Stanstead, Shefford and Missiskoui. The Legislature, therefore, has been perfectly consistent with itself in confining the enlargement of time for enregistration to these last mentioned Counties, in which only the registration of old titles was required by the Act 10th and 11th Geo. IV, c. 8, and by thus confining this enlargement, the Legislature has confirmed the fact that the provision for the registration of old titles to land has not been extended to the County of Ottawa: if it had been, the en-

largement of time would also have been extended to that County. There was not, therefore, at the time of the making of the deed of sale from the widow and heirs Robertson to the Defendant, on the 2nd August, 1833, nor was there, at any time before the institution of the action, any law that required the registration of titles to lands *in the County of Ottawa* which were executed prior to the passing of the Act 10th and 11th Geo. IV, c. 8, registration *in that County* being only required to be made of certain incumbrances and of titles to lands made and executed *subsequently to the passing of the last mentioned statute*. This ground, at once so plain and conclusive, is in reality alone sufficient for the determination of this cause, inasmuch as it destroys *funditus* the *defence*, and the *only* defence, which has been set up by the Defendant.

2. Because, the provision contained in the 2nd section of the Statute 1 Will. IV, c. 3, by which the registration of *all* pre-existing titles to lands in certain Counties, within the extremely short space of one year, is required on pain of forfeiture by the owners of their right of property in favor of other persons, without right or legal claim, is an *ex post facto* legislative enactment, subversive of the established rights of property, is inconsistent with the first principles of natural law, reason and justice, and without example in any civilized country, and ought, therefore, to be controlled by the common law, and held to be null and void. (1)

(1) Vide *Bohham's case*, 8 Coke's Rep. 116:—*Hobart's Rep.* pp. 85, 86 and 87, *Day vs. Savage*:—10 Mod. Rep. 115:—12 Mod. Rep. p. 687, *City of London vs. Wood*:—2 Dwaris, 642, 643:—*Fonbl. on Eq.* 23:—*Rep. de Mer. vbo. Effet Rétroactif*, pp. 533, 534, 535, 536, 564, 604, 605:—1 Kent, pp. 423, 381:—*Code Civil*, Art. 2, Prelim. as to Inscriptions. Vide—as to *prospective* nature of Registry Acts in England, 2 Ann, c. 4:—5 Ann, c. 35:—7 Ann, c. 20:—In Ireland, 6 Ann, c. 2: In the West Indies, Grenada Laws, p. 8:—*Jamaica Laws*, p. :—In Upper Canada, 35 Geo. III, c. 5:—In the other British Colonies, 2 Burge, 829:—In France, Law of 11 Brumaire, an 7:—In the United States, 4 Kent, 161, 162, 163.

3. Because the provision of the law in question, if ~~capable~~ of being enforced, is confined to titles derived from *deeds* or *instruments in writing*, of which it prescribes the registration in a particular form ; but it has no relation to and leaves untouched titles to land derived from other and different sources, such as titles acquired by *prescription* or by *descent*. Of these latter titles no registration is required : nor is it possible, under the provisions of the Registry Acts now referred to, in any manner to register them. Now, the action of the Plaintiffs is grounded *not only* on a *deed* or *instrument in writing*, *but also* on titles by *prescription* and *descent*, as set forth in the Plaintiffs' declaration. The defence set up, therefore, in what respects registration of title, does not apply to the counts in the Plaintiffs' declaration, which assert a right of property in the Plaintiffs, acquired by *prescription*. On these counts the Plaintiffs' right of action against the Defendant has been completely and unanswerably established. The prescription *longissimi temporis* (30 years) has been proved by a number of witnesses, being composed of the possession held by the Plaintiffs and their predecessors, through whom it reaches back to the date of the Letters Patent from the Crown to John Robertson, bearing date the 29th day of November, 1799, (1) and the full period of its completion ended on the 28th day of November, 1829, that is, several years before the Defendant fraudulently obtained possession of the land in question, during the absence of the Plaintiffs in England.

4. Because, the Plaintiffs' right of property in the land in question was principally acquired by *descent* or *inheritance*. Elizabeth Robertson, one of the Plaintiffs, inherited one-fourth of the said land from her sister Catherine Ann Robert-

(1) Vide Pothier, Prescription, Nos. 119, 123 :—Dunod, Prescription, 18, 19 :—Troplong, Prescription, No. 428 :—2 Chitty on Pl. pp. 518, 563, 567, 573, 637, 638 :—3 Chit. on Pl. 544, 545, 546.

son, and one-half of it from her cousin Elizabeth Ann Robertson, who was heiress of her father Neil Robertson, who was heir of his brother Patrick Robertson. As to three-fourths of the property, therefore, her title was a title by *descent*, of which no registration was required or could be made.

5. Because, if a provision of law, requiring the registration of their title, were applicable to the Plaintiffs, (and it is contended that none such existed) they (the Plaintiffs) laboured under a disability which precluded them from complying with any such provision. They were constrained to leave Lower Canada in May 1831, *before* the publication of the Registry Law of that year relied on by the Defendant, and continued absent from the Province, under an entire ignorance that there was any such law, till after the period within which registration was required to be made had elapsed. But within five weeks after the return of the said James Stuart, one of the Plaintiffs, in 1834, the written title mentioned and recited in the Plaintiffs' declaration, to wit, the deed of sale of 15th October, 1804, was registered. It is therefore conceived that during this disability the Statute in question could not be held to be applicable to them.

6. Because, the said Elizabeth Robertson, one of the Plaintiffs, to whom the land in question belongs, at the time the Registry Law referred to was passed, being a married woman, was disabled, by reason of coverture, from complying with the injunction of the Legislature by registering her title as required. It could never have been intended by the Legislature, that married women, throughout the country and elsewhere, should forfeit their pre-existing rights of property in real estates, though complete and perfect, by the non-registration of their titles within the short space of one year; nor is it consistent with the general principles of law which

govern the rights and property of married women, that such a forfeiture should be incurred by them.

7. Because the provision of the Act 10th & 11th Geo IV. c. 8, requiring the registration of titles to lands, is applicable to cases where the grantees, under registered and unregistered titles, derive their rights from the same grantor, not where they derive their rights from different grantors (1) as in this case.

8. Because the provision of the registry law now referred to can only apply to cases where the grantee in the registered title, had some interest in the premises alienated, which could be made the subject of alienation, not where he was a stranger to the estate, having no interest in it whatever. (2) In this case Catherine Christie, who sold to the Defendant as *commune en biens* with her late husband, had not, in that character, a particle of interest in the property she presumed to sell. The sale of the 15th October, 1804, being made by her husband, though as her attorney, divested both him and her of all right and interest whatever in the estate, and she had nothing to convey to the Defendant. So his children, as his heirs, were equally without any right or interest which they could convey to the Defendant; their father, having ceased, on the 15th October 1804, to have any right of property or interest in the estate, could transmit to them no right or interest, in it, as his heirs, by his death in 1815. There was not, therefore, in this case, the shadow of a pretence for the sale in question made to the Defendant.

9. Because the Defendant is proved, in this cause, to have

(1) On this point, vide, the following American cases, the registry law in both countries being the same, 11 Pick. 80, Tyler vs. Hammond :—Minot's Digest vbo. Deed, § 4, Nos. 33 and 38 :—Dig. U. S. R. vbo. Deed, No. 250 :—5 Cranch 154 :—2 Binney, 497.

(2) Vide the following American decisions : 4 Cow. 599, Jackson vs. Town :—Dig. N. Y, Rep. vbo. Deed, No. 403 :—Minot's Digest vbo. Deed, No 36, p. 206 :—14 Pick. 224 :—Dig. U. S. R. p. 42, No. 390, vbo. Deed.

had notice of the Plaintiffs' title before he purchased the lands in question, from the fact of the Plaintiffs having been for a long period of time, while the Defendant lived in the immediate neighbourhood, upon adjoining land, in the open, quiet, exclusive possession of these lands as owners, and also from general repute, as well as from distinct information, and knowledge of their title. The registry Act 10th and 11th Geo. IV, c. 8, in question in this cause, has evidently been framed with reference to the English and Irish Registry Acts, the more important terms of which it adopts: the object of the Provincial Act, as well as of those from which it has been derived, was to protect *bona fide* purchasers for valuable consideration, from prior secret conveyances and incumbrances of which they might be ignorant, and by which they might be defrauded, by giving such purchasers, notice of previous conveyances and incumbrances through the medium of a public register. But it was not intended by these statutes to enable purchasers, with a knowledge of prior unregistered deeds, to defeat them fraudulently, to the prejudice of the grantees, by registering a later conveyance. The object of the legislature is fulfilled if notice of such prior deeds reach purchasers through other channels by which they are made equally safe. If notwithstanding notice thus conveyed, persons will purchase property already sold they do so *malâ fide*, to the injury of the previous purchasers, and are chargeable with fraud against those whose title they endeavour to defeat and destroy. Upon this ground, it was held, at an early period after the passing of the English and Irish Acts, both in England and Ireland, and has since continued to be the established law in both countries, that a subsequent purchaser for a valuable consideration, with notice of a prior unregistered deed, cannot by registering the later conveyance to him, obtain a priority over the former, or in any manner defeat it. (1) The same principle has been

(1) Vide Fonbl. on Eq. 23 :—Eq. Ca. Ab. 258, *Blades vs. Blades* :—4 Bro. Parl. cases 189, *Cheval vs. Nicols* :—1 Str. 664 :—Cowp. 712, *Leneve vs Leneve* :—

adopted in all the countries in which the system of registration as it obtains in England and Ireland, has been transplanted. It is recognized as the rule of law in the British Colonies, (1) and in all the States composing the American Union without any exception (2). It is conceived, therefore, that this principle must govern the construction of the Act 10th and 11th Geo. IV, c. 8, and the more imperatively as being an *ex post facto* law, the severity and injustice of which would require all the relaxation that equity could afford in its construction. The notice in such cases may be either *express* or *implied*, (3) and the notice which puts the party on enquiry, as to the validity of the unregistered title, is held to be a sufficient notice (4). In this case the sufficiency of the notice which the Defendant had of the Plaintiffs' title, it is presumed cannot be questioned, inasmuch as it was both express and implied, and resulted not only from open, quiet, exclusive possession, by the Plaintiffs, of the lands in question for a long period of time under the very eye of the

1 Ves. 64 :—3 Atk. 646 :—2 Bl. 343 :—4 Madd. R. 327. Jolland *vs.* Stanbridge :—3 Ves. p. 478 :—16 Ves. pp. 419, 427 :—3 Meriv. 210. Sheldon *vs.* Cox :—Ambler, 624 :—2 Eden, 228. Bushell *vs.* Bushell :—1 Sch. and Lef. 100.

(1) 2 Burge, p. 337.

(2) Dig. U. S. R. vbo. Deed, p. 41, No. 380 :—Dig. N. Y. Rep. vbo. Deed, § 7, No. 370 :—Minot's Dig. vbo. Deed. p. 203 :—4 Kent, 161 *et seq.* :—4 Mass. Rep. 637. Fainsworth *vs.* Child :—3 Pick. 149. McMickan *vs.* Griffin :—5 Mass. Rep. 24 :—10 Mass. Rep. 60 :—1 Ham. 274 :—8 John. 137 :—9 John. 163 :—10 John. 466 :—4 Wend. 585 :—4. Randolph, 208 :—13 Serjt. and Rawle, 167 :—2 Han. and Gill, 415 :—1 McCord, 265 :—8 Verm. Rep. 373 :—3. Verm. Rep. 255 :—6 Verm. Rep. 411 :—2 Burge, 537 :—20 Louisa. Rep. 246, 249.

(3) 1 Burr, 474. Sir Ed. Worsley *vs.* Dr. Mattoes, where Lord Mansfield expresses himself as follows : " Valid transactions, as between the parties, may be fraudulent, by reason of covin, collusion or confederacy to injure a third person, for instance: A. buys an estate and forgets to register his purchase deeds; if C., with express or implied notice of this, buys the estate for a full price, and gets his deed registered, this is fraudulent, because he assists B. to injure A. Or, if a man, knowing that a creditor has obtained a judgment against his debtor, buys the debtor's goods for a full price to enable him to defeat the creditor's execution, it is fraudulent.

(4) Vide 2, Ch. Eq. Dig. § 13, p. 1336 :—1 Mer. 282 :—2 Bakt. and B. 416, 391 :—16 Ver. 249, 426 :—13 Ves. 120 :—2 Ves. jun. 247, 440 :—2 Eden, t. N. 280 :—Amb. 311 :—1 Ves. 61 :—3 Atk. 238. For a case on this point in the State of New York, vide, 6 Wend. 213. Tuttle *vs.* Jackson :—Dig. N. Y. Rep. vbo. Deed, p. 663, No. 367.

Defendant, but also from general and common repute, and from specific information and knowledge of the Plaintiffs' title, as above stated. On this ground, therefore, the Plaintiffs conceive their unregistered title must prevail over that of the Defendant. (1)

10. Because the Defendant's title, and the registration of it, originated and were concocted in a fraudulent conspiracy, between the grantors and himself, to cheat and defraud the Plaintiffs of the land in question, by the giving and taking for a *sham price* a pretended title, which both parties knew to be worthless, and in itself not better than waste paper, merely for the purpose of registering it, in order thereby to defeat and destroy, as they expected, the title of the Plaintiffs, which they knew to be unregistered in consequence of their absence from the country. Such a fraudulent abuse and misapplication of the law of registry cannot be permitted to confer a title on the Defendant. If the law could be so applied, it would be made, under the grave and imposing authority of Courts of justice, an instrument of fraud and spoliation, and would afford a *premium* on dishonesty and knavery, to the utter disgrace of its enactments and the disparagement of the administration of justice.

The Defendant submitted that the Plaintiffs had signally failed in their endeavour to establish, that they, or their alleged predecessors, were commonly reputed in Buckingham and the neighborhood, to be the proprietors of the tract in question, although this seemed to be the principal object kept in view in the examination of their witnesses.

(1) Since the commencement of this case, a Provincial decision, involving the principal points which it presents, and particularly the effect of notice in sustaining an unregistered title in preference to a registered one, has come to the Plaintiffs' knowledge. It is a judgment of the Court of King's Bench at Sherbrooke, in 1835. in the cause of Smith vs. Terrill and Philip's Oppts., the Court being composed of Mr. Justice Bowen, Mr. Justice Vallières de St. Réal and Mr. Justice Fletcher. By this judgment the doctrine of Notice and other positions here stated were adopted and made the grounds of decision.

That they had failed to attach any suspicion of bad faith to the Defendant in reference to the purchase made by him from Mrs. Robertson and her daughters.

That, in like manner, they had failed to prove, as they had alleged, that Sir James Stuart, one of the Plaintiffs, was constrained to leave Lower Canada "by reason of his being in the service of the Crown, and in fulfilment of his duties as a Public Officer in such service," the fact as proved being that Sir James went to England, after having been deprived of the office of Attorney General of Lower Canada, not on any public mission, but on some errand which, it might be fairly presumed, was of a strictly private character, as the Plaintiffs had not thought proper to disclose it in evidence. They had also failed to prove any such possession of the lots in question as would entitle them to hold under any one of the various kinds of prescription pleaded. Indeed, they had been unable to prove that they had ever been at any time in possession of any part of the Robertson tract.

The Defendant also urged that the Plaintiffs, notwithstanding certain admissions granted to them, had not legally established their right to claim any part of the tract of 2000 acres under the deed of sale of the 15th October, 1804, even though it was admitted that the tract was duly transferred to Patrick Robertson, and the minor children of Alexander Robertson under that deed.

SMITH, Justice, dissenting :—This case is of the greatest importance, and a number of questions have been raised by the pleadings; it would take a long time to go over them simply; but what increases the labour is, that each point has been made the subject of extended argument by the Counsel of the respective parties. (His Honor here went

over the pleadings.) By these pleadings, the following issues have been raised :

1. The validity of the Plaintiffs' title.
2. The validity of the Defendant's title from Mrs. Robertson and her daughters, consequent upon good faith and registration, and its prevailing over the Plaintiffs' in consequence of possession following.
3. That this title is a bar to the action.
4. That the Plaintiffs' title is absolutely null and void, in consequence of the operation of the Registry Acts, the title in question not having been registered under the provisions of those laws.
5. That Catherine Christie and her daughters were strangers to the property, and could convey no legal title, and that consequently the registration of a deed from them is valueless, and can have no force or effect.
6. That the Defendant's title is bad by reason of fraud.
7. That registration by the Plaintiffs, within five weeks of their return to the Province, is sufficient to preserve their title.
8. That Eliz. Robertson, the wife of James Stuart, being at the time of the passing of the 10th and 11th Geo. IV, and 1 Will. IV, under coverture, the said law, cannot affect her rights.
9. That there is fraud on the part of the Defendant.
10. Whether compensation for betterments is to be given to a party, who has fraudulent possession, and is in bad faith ?

The Plaintiffs urge a title; the Defendant urges another title, with registration, and he sets forth the invalidity of the

Plaintiffs' title for want of registration ; and the Plaintiffs meet the Defendant's allegation of title, by alleging it to be a fraudulent one, and consequently null. The Plaintiffs' title has been alleged by various counts as subsisting under both the English and French systems of law. It is, therefore, first necessary for the Court to decide what the law is, which is in force in the County of Ottawa in respect to lands held in free and common socage. It is a principle laid down by the best authorities and universally recognized, that where a country is obtained by conquest or treaty, the King possesses an exclusive prerogative power over it, and may modify and alter the laws existing in the country at the time ; but, in England, this right is subject to the control and revision of Parliament. It is also well settled that the King, in making these changes, cannot violate any articles of capitulation, which may have been assented to in favor of the conquered, and that these articles are sacred. In applying these incontrovertible rules to the case of Canada, upon reference to the articles of capitulation, it will be found that when the Marquis de Vaudreuil asked the British General to promise the maintenance of the inhabitants in their ancient laws and customs, the reply was, that they became subjects of His Majesty, and must await the expression of the King's pleasure in that respect.

The first intimation of this pleasure was contained in the proclamation of 1763, in which it was declared that His Majesty's subjects in the then Province of Quebec, should be maintained in the enjoyment of the laws of England. This, it has been held, has never been carried out, and was a mere declaration of intention. But on the other hand, this has been contradicted by the establishment of Courts of Justice, which are ordered to administer justice and equity, as nearly as may be, in conformity with the laws of England. After the establishment of these jurisdictions, political diffi-

culties arose ; some of the judges administered the English law, others such law as they saw fit. Hence arose a difference concerning the interpretation of the proclamation. But Courts of Justice have nothing to do with these difficulties between political parties. If the Crown had the right to make such a declaration as that contained in the proclamation, and its intention to introduce the English law, was thereby made distinctly manifest, we have nothing to do but to carry that intention into effect. These matters were maturely weighed and considered, during the debates upon the Quebec Act of 1774. Do we not find in that Act a sufficiently distinct recognition of that intention ; and if it was so endorsed by the authority of Parliament, must it not be held to be binding ? We find it enacted in the fourth section of that Act, “ that whereas the provisions of the said proclamation in respect of the civil government of the said Province of Quebec, &c. have been found upon experience to be inapplicable to the state and circumstances of the said Province, the inhabitants whereof amounted at the conquest to above 65,000 persons, professing the religion of the Church of Rome, and *enjoying an established form of constitution and system of laws* by which their persons and property had been protected, governed and ordered for a long series of years, &c.”, it was, therefore, so far as related to the civil government and administration of justice in the Province, &c., revoked, annulled and made void, from and after the 1st May, 1775. Could this Act have formally abrogated that which had never subsisted ? Was not the intention of the Crown, and the acquiescence of the Parliament up to this period made manifest by this Act ? It did not declare it to have been null, but annulled it from and after a certain date. The mere effect of our becoming subjects of the Sovereign of Great Britain, renders us subject also to the proclamation, issued by his Privy Council, up to the time that Parliament saw fit to interfere, and this Act, by

its terms, maintained what had been done by virtue of that proclamation, only annulling it for the future. By the eighth section the right to hold property by Canadian subjects under the old tenure is conceded, "as if the said proclamations, &c., had not been made," &c., further ordering, that for the decision of matters in dispute, relative to property and civil rights, recourse shall be had to the laws of Canada. The Imperial Parliament plainly held, then, that it required a distinct enactment on their part to re-convey to the Canadians their rights to the administration of the French system of laws, which they must consequently have held to have been formerly taken away by the capitulation and proclamation. Then, on reference to the 9th section, which is framed in the form of a proviso, we find it enacted, that "nothing in this Act contained shall extend, or be construed to extend, to any lands that have been granted by His Majesty, or shall hereafter be granted by His Majesty, his heirs and successors, to be holden in free and common soccage." If this proviso, instead of extending to the fourth section, and other portions of the Act, as its terms would imply, only extended as a proviso to limit the enactment contained in the 8th, (the next preceding section,) it nevertheless formally declared by the enactment contained in it, that recourse should be had, in the cases named, to the laws heretofore in force in Canada, and should not apply to lands granted in free and common soccage. Can it be maintained, in the face of these declarations and enactments, that the old system of laws was to be applied, as well to the vast extent of territory, both in what is now Upper Canada, and in the Townships of Lower Canada then known as the waste lands of the Crown, as to the old territory already occupied by the French Canadian inhabitants? Clearly not. Some difficulty arose about the extent of the application of this proviso, it being contended, that as no other part of the Act but the next preceding 8th section referred to lands, this section only referred

to it, and its force being held by some to be very limited, the differences between the parties gave rise to the passing of the Tenures Act, 6 Geo. IV, cap. 119, by the Imperial Parliament. In all the fierce struggles which ensued between contending political parties in the Province, the abstract right of the Imperial Parliament, to legislate upon this point, has never, to my knowledge, been disputed. This is conclusive proof, that the right was recognized, and it undoubtedly exists. This Act recognises the declarations of the Proclamation, and confirms the provisions of the Quebec Act in this regard, but at the same time limits it. The eighth section of that Act is as follows: "That all lands within the said Province of Lower Canada, which have heretofore been granted by His Majesty, &c., to be holden in free and common socage, or which shall or may hereafter be so granted, &c., may and shall be, &c., held, granted, bargained, sold, alienated, conveyed, and disposed of, and may and shall pass by descent, in such manner and form, &c., as are by the laws of England established and in force in reference to grants, &c., descent, &c., or to the dower and rights of married women." Could language be stronger than this? If the power be admitted to have existed in the Imperial Parliament to pass this law, (and it has always been admitted,) this must be conclusive upon the point. But the Provincial Parliament has itself acquiesced in and confirmed this enactment, at the same time that they in some degree modified it by the Act of 1829. Whether this Statute has the force of law or not, it is still a formal recognition of the right of the Imperial Parliament, and this concurrence of the Colonial Legislature should remove every doubt which might previously have existed upon that point. I do not hesitate to declare my opinion, that it was in force as law, although it did not receive the Royal Assent within the two years mentioned in the Quebec Act. The Law Officers of the Crown have held, indeed, that it required a special Act of Parlia-

ment to enable the Crown to assent to it, after that period had elapsed—and it has been assented to with the additional rights which such an Act could confer. The case of the withheld consent to a contract, for the limited space of time, is widely different from this. The provision of the two years' limit, within which the Crown may assent, is made in favor of the Crown. The continuance of the Act before the Sovereign for this consent, is a sufficient mark of the continuance of the consent of the Colony, to which the Crown can therefore validly add its consent at any time, so long as the Act is not withdrawn. I am of opinion then, that the English law, with the restrictions contained in the last named Statute, is in force in respect of township lands.

How then is the law to be applied in this case? The title set up by the Plaintiffs in their first count, is a title in Patrick Robertson and the minors, his nieces, by joint tenancy, governed by the peculiar principles of the English law. It is subject to the right of survivorship. A positive title by survivorship has been made out in the Plaintiff, Elizabeth Robertson, which cannot by any possibility be shaken, if the Act of 1829 is the law of the land. The transfer was made by a valid Instrument according to the English law, and carried with it a right of survivorship. Under the first count the title is unquestionable. The title, *par indivis*, set forth by the second and third counts, is also a good one under the Act of 1829, and it has, by descent, come to be legally vested in the Plaintiffs. The next form of title to be noticed is that of the English prescription, which however I will waive, consenting for the present to the doctrine (of which I am by no means convinced) that that form of acquisition has not been introduced here; the English law only having force in matters of conveyance, descent or inheritance, and dower. Coming next to the 30 years' prescription of the French law, I

will notice it, for the purpose of considering the vital question of *seizin*, upon which, it seems to me, the whole case turns. Non-delivery by John Robertson or his Attorneys, and non-seisin by the Plaintiffs has been alleged. I may notice here also two technical objections to the validity of the Deed to Patrick Robertson, &c., which have been urged by the Defendant's Counsel. These are, that it is not indented or enrolled. These objections which I think of no weight, are sufficiently answered by the terms that justice is to be administered "as nearly as possible" according to the law of England. The state of the country has been such as to render it in many cases quite impossible to comply with such formalities, and a mere quit-claim Deed has been received as a title, both in Upper Canada and here. With regard to another objection, that the form of action is not the English one, it has always been held, that the form of remedy is to be decided by the place where the action is instituted. The right exists here to bring a Petitory action, and such an action has been brought.

Coming then to the question of possession it may be viewed in a two-fold light, and first without reference to the Registry Law. Did there pass, by means of the conveyance of 1804, any delivery of the property, such as would constitute livery of *seizin* under the English law? It is a principle in law that before a person can exercise the right of revendication, there must have been vested in him an actual *dominium*, not a mere abstract right of property. The acquisition of this *dominium* may be made out in one way, where there is no adverse possession, but in a different way when there is such adverse possession. Under the law "*quoties*," if one party acquired without getting possession, and another subsequently acquired and got possession, the latter would hold the property notwithstanding that his title was subsequent to the other. But it is here presupposed, that the common *auteur*

retained possession himself after the first sale, and while actually in possession effected the second sale (1). In this case, at the time of the passing of the deed of sale, there was a delivery of the Letters Patent, (the vendor's title) and a diagram of the property, and this delivery was mentioned in the deed, coupled with as strong terms of disseizin and abandonment, on the part of the vendor, as could be used. This is the turning point of the case. Unless the Defendant can shew his title to come as far as this, the Plaintiffs' claim must be maintained. The transfer of title has been held to be a sufficiently symbolical delivery, and such a delivery has taken place in this instance. Under the Coutume d'Orléans it has been held that the simple clause of seizin and disseizin was sufficient. At all events, after such an abandonment of the property by John Robertson, it could never become re-invested in his estate by any possibility, without a retransfer of it (2). But if, according to the opinion of the majority of the Court, a real possession was necessary, we have proof of such a possession by the witness Dunning, who stated that he held possession under the Plaintiffs for a long time. We have besides the continued possession of Sutherland, curator to the estate of Patrick Robertson, through persons to whom he gave liberty to cut timber, and from whom he had derived profits upon the sale of it. The possession by both these people inured to the Plaintiffs in my opinion, though that of the curator was held to be an interruption, by the majority of the Court. In examining the Defendant's title, it was found to be derived from the widow of John Robertson, representing her husband, who by her own instrumentality had divested herself of the property, and who afterwards abandoned it alto-

(1) Pothier Dom de Prop. No. 324 :—Ricard Tr des Donations 949.

(2) Pothier Dom. de Prop. No. 242 :—Ricard Tr. des Donations 938 to 948.

gether and left the country, and died abroad. Whence did she derive her title? She declared by the deed to the Defendant, that she was not in possession of the property; and the sale of mere titles is prohibited by law. John Robertson died in 1815, without any right, title, or possession to this property: by what means did it become invested in his succession? And how came his wife, who returned about 1832, entitled to sell it as representing that estate? With regard to the Registry Laws, they were not made to protect fraud but to guard against it, and to compel those people holding titles, and incumbrances in secret, to make them known. That this title was obtained in fraud is manifest from the absence of title in Catherine Christie, and her daughters, and from the knowledge by Bowman, that the title resided in the Plaintiffs. This latter fact is proved by almost all of the twenty witnesses produced by the Plaintiffs; the majority of whom swear that it was commonly known in that part of the country, that the Plaintiffs owned it. Was it likely that the Defendant desiring to purchase, should be the only man who did not know who the proprietor was. But several witnesses, among others, Dunning, whose evidence ought not to be rejected, swore positively that the Defendant knew of it, as he had mentioned it to him. The Plaintiffs' title then being a good one upon several counts, and the Defendant's title having been obtained in fraud, I am of opinion, that judgment should go in favor of the Plaintiffs.

VANFELSON, Justice :—Giving the judgment of the Court :—I differ from the learned President in the opinion he has expressed, that the English law is in force in the Townships. It is true that the Crown has the right, by virtue of its prerogative, to provide for the Government of, and administration of justice in, a conquered or ceded country, but in the silence of the Crown upon the point, the laws of the conquering country are not introduced, but

those of the conquered people remain in force. Has then the Sovereign of Great Britain introduced the English law? Upon this point our attention has been first directed to the forty-second article of the capitulation, the answer to which leaves the law in abeyance, subject to the future disposal of the Sovereign. The Treaty of Peace, by which the country was formally ceded, is also silent upon the point. Next in order is the Proclamation of 1763. I thought, at the time of the argument, that the English law had been introduced by that Proclamation, but upon further consideration I now believe that was an erroneous opinion. The terms of the Proclamation are by no means sufficiently distinct and formal to be considered as introducing the body of the English law. But besides the administration of the Government, it was necessary to provide for the disposal of the lands constituting what was called the domain of the Crown, and these were to be ceded under free and common soccage, and to be administered by the Governor, as in the other Colonies, referring undoubtedly to the other North American Colonies. There is no inconsistency in introducing several different tenures of land, but there would have been great incongruity in introducing several different and distinct systems of law into the same country, divided, in the extent of their jurisdiction, by the lines which divide the old grants from the new, and requiring them to be administered to the different parties by one and the same tribunal. It is the Act of 1774, which really raised the difficulty respecting the extent to which the English laws were introduced into Canada. At the time when this was passed it had been found that the species of jurisdictions, which had been established, were inconvenient both to the old settlers and the new. The eighth section of this Act has more special reference to the subject of tenures, and gave to the *seigneurs* and others, the same beneficial rights which they had ever enjoyed previous to the dispute concerning

the interpretation of the Proclamation of 1763. The ninth section, which has been cited, can only be held to refer to this subject, for although it is couched in terms as if meant to apply to all the provisions of the Act, yet, it will be found quite impossible to give it that application. It must be held then to be a proviso to the next preceding section only, and simply to mean that seigniorial and feudal rights shall not affect the lands so newly ceded. To say that the whole body of the English law was to have force in respect to them, would be an absurdity. The Court has next to consider the Imperial Act of 1825, (6 Geo. IV. cap. 59.) I believe that the Imperial Parliament had the right to pass that statute as a Declaratory Law only. But, by this Act, as shewn by the eighth clause, the English law is only introduced, in respect of these lands, in three particulars, viz : conveyance, descent or inheritance and dower ; and I think that the Imperial Parliament has gone very far in this. I believe that the Provincial Act of 1829 has never had force of law, but served as an explanation of the views of the Colonial Legislature in relation to the question. I conceive it to be manifest, then, that the English law has never been introduced into Lower Canada, except in the three points mentioned by the Act of 1825 ; and by that Act, and not before, has it been introduced to govern Township lands. I will next pass to the consideration of the Plaintiffs' title. They have produced, to corroborate it, the Letters Patent to John Robertson, and a deed of sale from Catherine Christie and one Martin, as joint Attorneys of John Robertson, to Patrick Robertson and Francis Des Rivières, tutor to the minors, children of Alexander Robertson, of whom the Plaintiff, Elizabeth Robertson, was one. I will here mention some technical defects, which the Court is disposed to pass over, to found its judgment upon the general principles involved in the case, but to which it is but fair that the attention of the Defendant's Counsel should be called, in

order that they may be made available elsewhere, should the case be carried further, as is likely to be the case. In the first place the certificate of the Provincial Secretary to the Copy of Letters Patent produced, is not such as the law requires for their authentication. In the next place there is a variance between the Letter of Attorney annexed to the deed of sale, and its recital in the deed. In the latter document it professes to be made by the two Attorneys above named, before the notaries executing the deed of sale, while upon referring to it, it is found that the letter was given to these parties conjointly with two others, and was not executed by the same notaries. It is not, then, the Letter of Attorney mentioned in the deed. But passing over these purely technical defects, the Court hold that there has never been a completion of the sale, by a delivery of the property. Even if the principle were admitted, that the Queen's Letters Patent carry with them livery of seisin, (of which the majority of the Court are by no means assured,) and that, therefore, the property was vested in John Robertson, yet there has never been any delivery, either feigned or real, from John Robertson to the Plaintiffs or their *auteurs*. (1) And we hold that this delivery was absolutely necessary to complete the sale. So far as regards the sale therefore, the Plaintiffs' pretensions are untenable. With regard to prescription, we are of opinion, for the reasons stated, that the English prescription is not in force here. To acquire a title by prescription under the French law, an absolute physical possession (*possession naturelle*), as well as a civil one is necessary, and this has not been shewn. If there has been any possession, it has been interrupted by that of Sutherland, as curator to the vacant estate of Patrick Robertson. From 1804 to 1808, no sort of possession has been shewn, and from 1808 to 1823, a possession has been shewn in Sutherland, if in any body, though that possession

(1) 4 Pothier, *Traité du Dom. de Prop.* No. 286.

is not such a one as to acquire a title by prescription. If it were, it must be held to have been an adverse one, for the possession of a curator to a vacant estate is not in favor of the heirs at law who have renounced, but in favor of the creditors of the estate. (1) The Plaintiffs, then, have entirely failed to make out a title, either by sale or prescription, and the Court might, without going any further, dismiss their action, for there is no rule of law which is better established than that, in such cases as this, the Plaintiffs must shew a good title, before the Defendant, in possession, need defend himself; nor is any thing more strictly in accordance with common sense. I will now make a few observations upon the Defendant's case. The Defendant has shewn a title, valid upon the face of it, and duly registered. There is no bad faith proved on the part of Bowman. The old men, who have been examined, all swear that the report concerning the proprietorship of this property, known to them as the "Robertson tract," was to the effect, that it was vested in the Robertson heirs, some of whom were minors. Mrs. John Robertson, (Catherine Christie,) came to the country, and professed, in common with her daughters, to own the property, and sold it to Bowman. Any rumors about the Plaintiffs' right to the property, had come, as they stated, from young Mr. Stuart, since dead. There is no doubt, that registration will not mend a title obtained in bad faith; it requires good faith in the purchaser to make his registration valid. But Bowman having acquired in good faith, and registered his title, he is entitled to say to all persons whose claims have not been registered—my title has, by a valid registration, acquired a preference over yours.

MONDELET, Juge : Depuis que le Canada appartient à l'Empire Britannique, les tribunaux de ce pays n'ont jamais

(1) Pothier, Prescript., No. 1, p. 577, 637 et 167 :—13 Rep. Juris. vbo. Prescription, p. 301.

été appelés à décider une question d'une aussi haute importance que l'est celle qui se présente ici, je veux dire la grande question de savoir si les lois civiles de l'Angleterre ont, à aucune époque, été introduites en cette Province.

On comprend sans difficulté, qu'aux termes de la sec. 8^{me} de l'Acte Impérial de 1774, communément appelée "Quebec Act," c. 83, la cause qui est soumise à cette cour, étant une action en Revendication ou Pétitoire, doit être jugée d'après les lois françaises, le droit du pays, à moins que les lois anglaises n'aient été introduites en Canada quant aux terres et héritages tenus *en franc et commun soccage*.

Cette action étant une action en revendication (ou pétitoire) de divers lots de terre, situés dans le *Township de Buckingham*, on peut réduire aux suivantes les questions qui en surgissent :

1. Les Demandeurs ont-ils un titre ?
2. S'ils ont un titre, il résulte d'une prescription acquise par une possession de 30 ans, revêtue des qualités requises par la loi ou de prescription plus courte, avec titre et de la manière que le veut la loi ; ou
3. D'un acte ou d'actes translatifs de propriété.
4. Le Défendeur a-t-il un titre ?
5. S'il a un titre, de qui le tient-il ?
6. S'il a un titre, a-t-il acquis un droit irrévocable à la propriété en question, les Demandeurs, dans la supposition où ils auraient un titre, ne l'ayant enregistré qu'après l'enregistrement effectué par le Défendeur.

Il faut donc, avant tout, savoir d'après quel système de lois les droits respectifs des parties doivent être jugés.

Pour bien saisir cette importante question, il faut se reporter à la cession du pays à la couronne d'Angleterre, en 1763.

En 1759, les armes victorieuses de l'Angleterre soumettent leurs vaillants ennemis, les Français.

En 1760, a lieu la capitulation.

En 1763, intervient le traité de cession.

L'article 42 de la capitulation du 8 septembre, 1760, ne peut assurément pas être invoqué comme une reconnaissance de la part de l'Angleterre, que la coutume de Paris fût alors, et devint par la suite, la loi du pays, puisqu'en réponse à la demande de Mr. de Vaudreuil que " les Français et Canadiens continueront d'être gouvernés suivant la coutume de Paris, et les lois et usages pour ce pays," le Général Anglais écrit, " répondu par les articles précédents, et particulièrement par le dernier, c'est-à-dire, ils deviennent sujets du Roi." Ces expressions étaient bien naturelles dans la bouche du Général Anglais, qui, sans doute, craignait d'assumer une responsabilité aussi grande que l'eût été celle de décider seul cette question ; il soumettait, par cette réponse, le tout à la décision des autorités impériales. Au reste, du silence ou de la réserve du Général Anglais il ne pouvait résulter autre chose, sinon que tout était indécis quant à l'objet dont il était question, et, en attendant, les lois du pays demeuraient.

Comme on a recours à des principes que l'on prétend être applicables à l'état d'un pays conquis, il est à propos de réclamer ici contre une habitude qu'on pourrait s'être faite de dire que le Canada a été conquis ; il faut s'entendre.

Il n'y a pas eu une conquête, dans le sens de la conquête de l'Angleterre, par les Normands. Il n'en est pas du Roi Geo. III, à qui le Roi Français céda le Canada, comme de

Guillaume le Conquérant, qui prend et retient ce qu'on ne veut pas lui laisser saisir.

Il n'en est non plus du Roi d'Angleterre comme de *Cortès* qui se rue sur le Mexique, et qui au lieu de l'obtenir par une cession, fait subir à l'infortuné *Montézuma* des humiliations qui le conduisent à une mort prématurée, c'était le moyen le plus expéditif d'en finir.

La position du Canada, lors de la cession, n'a rien d'analogue avec nombre d'autres exemples qu'on pourrait citer. C'est une cession qui a eu lieu, le traité le dit, et en fait foi.

Ainsi, les doctrines extrêmes et souverainement injustes que des politiques exagérés, dans des temps d'absolutismes et de malheurs pour les peuples et leurs libertés, se sont efforcés d'accréditer vis-à-vis des populations conquises, toujours à l'avantage des conquérants, ne sont aucunement applicables aux circonstances du Canada, de 1760 à 1763.

Mais supposons, pour un instant, que le Canada a été conquis dans le sens exagéré que l'ont prétendu certains individus, j'emprunte au Procureur-Général De Grey, et au Soliciteur-Général York, les passages suivants que je lis dans leur rapport à Sa Majesté, du 14 avril 1766 :

“ There is not a maxim of the common law more certain than that a conquered people retain their ancient customs till the conqueror shall declare new laws.”

Le droit des gens est là, le *jus gentium*, pour revendiquer ce que des prétentions barbares et infectées des notions rétrécies du moyen âge, mettent en question.

Écoutez le langage d'hommes d'état, et d'hommes de loi, chez qui, l'honneur, le désintéressement national et individuel, la science et le bon sens ont si noblement et si humaine-

ment proclamé : c'est le Procureur-Général Thurlow, dans son rapport au Roi Geo. III, du 22 janvier 1773.

“ The Canadians seem to have been strictly entitled by the *jus gentium* to their property, as they possessed it upon the capitulation and treaty of peace, together with all its qualities and incidents, by tenure or otherwise, and also to their general liberty ; for both which, they were to expect your Majesty's gracious protection.

It seems a necessary consequence that all those laws, by which that property was created, defined and secured, must be continued to them. To introduce any other, as Mr. York and Mr. De Grey emphatically expressed it, tends to confound and subvert rights instead of supporting them.”

Mr. le Procureur-Général Thurlow, envisageant alors la proclamation des droits du Souverain, et les droits du Souverain sur le pays nouvellement acquis, et faisant voir ce que la justice et l'honneur exigent que l'on fasse à l'égard des habitants de ce pays, aborde une autre question, celle qui autorise le Souverain de faire ce qu'exige la nécessité, et alors il s'exprime comme suit :

“ Although the foregoing observations should be thought just, as a general idea, yet circumstances may be supposed, under which, it would admit some exceptions and qualifications. The conqueror succeeded to the *sovereignty* in a title at least as full and strong as the conquered can set up to their private rights and ancient usages. Hence would follow every change in the form of government which the conqueror should think *essentially necessary* to establish his sovereign authority, and assure the obedience of his subjects. This might possibly produce some alteration in the laws, especially those which relate to crimes against the state, religion, revenue and articles of police and the power of magistracy. But it would also follow, that such a change

should not be made without some such actual and cogent necessity which real wisdom could not overlook or neglect, not that ideal necessity which ingenious speculation may always create by possible supposition, remote inference and forced argument—not the necessity of assimilating a conquered country in the article of laws and government, to the metropolitan state, or to the older Provinces which other accidents attached to the empire, for the sake of creating a harmony and uniformity in the several parts of the empire, unattainable, and, as I think, useless, if it could be obtained: not the necessity of gratifying the unprincipled and impracticable expectations of those few among your Majesty's subjects, who may accidentally resort thither, and expect to find all the different laws of all the different places from which they come, nor according to my simple judgment, any species of necessity, which I have heard urged for abolishing the laws and government of Canada.”

Ces opinions si saines, ces déclarations si honorables et si franchement faites au Roi, par Mr. le Procureur-Général Thurlow, sont appuyées par les rapports de Mr. le Solliciteur-Général Wedderburne du 6 Décembre, 1772, et sont éloquemment et énergiquement consignées le 14 Avril 1766, par Mess. le Procureur-Général De Grey, et le Solliciteur-Général York, dans leur rapport à Sa Majesté, qui avait précédé les autres.

Il n'en faut pas davantage pour faire voir que la Couronne ne pouvait, *seule*, changer les lois du pays en force avant 1759; l'Angleterre entière *ne le devait pas*, et il n'est que juste de déclarer ici ma ferme conviction que non-seulement le Roi, non plus que le Parlement Impérial ne l'ont fait, mais qu'il ne paraît pas même qu'ils aient jamais eu l'intention de le faire.

Nous voici arrivés à l'émanation de la Proclamation du 7 Octobre, 1763.

Il me paraît fort singulier qu'on attribue à ce document, des propriétés que le Roi même ne paraît pas avoir imaginé qu'elles possédât. Qu'y trouve-t-on ?

“ And whereas it will greatly contribute to the speedy settling of our said new Governments, that our loving subjects should be informed of our paternal care for the security of the liberty and properties of those who are, and shall become, inhabitants thereof; we have thought fit to publish and declare, by this our Proclamation, that we have, in the Letters Patents under our Great Seal of *Great Britain*, by which the said Governments are constituted, given express power and direction to our Governors of our said colonies, that so soon as the state and circumstances of the said colonies will admit thereof, they shall with the advice and consent of the members of our said Council, summon and call general assemblies within the said Governments respectively, in such manner and form as is used and directed, in those colonies and provinces, in *America*, which are under our immediate government; and we have also given power to the said Governors, with the consent of our said Councils, and the Representatives of the people, so to be summoned as aforesaid, to make, constitute and ordain Laws, Statutes and Ordinances for the public peace, welfare and good Government of our said colonies, and of the people and inhabitants thereof, as near as may be, agreeably to the Laws of *England*, and under such regulations and restrictions as are used in other colonies; and in the mean time, and until such assemblies can be called as aforesaid, all persons inhabiting in, or resorting to our said colonies may confide in our royal protection for the enjoyment of the benefit of the Laws of our Realm of *England*; for which purpose, we have given power under our Great Seal to the Governors of our said colonies, respectively, to create and constitute, with the advice of our said Councils, respectively, courts of judicature and public

justice within our said colonies, for the hearing and determining all causes, as well criminal as civil, according to Law and Equity, and as near as may be, agreeably to the Laws of England, with liberty to all persons, who may think themselves aggrieved by the sentence of such courts, in all civil cases, to appeal, under the usual limitations and restrictions, to us, in our Privy Council."

Il me paraît évident que cette proclamation du Roi, qui lui ne pouvait seul changer les lois du pays, et qui, probablement n'en a jamais eu l'intention, ne renferme pas même l'expression du désir de Sa Majesté, que les lois anglaises, je veux dire dans leur ensemble, fussent introduites en Canada ; j'y vois, tout au plus, l'expression du désir du Roi, que les tribunaux du Canada jugeassent suivant la loi et l'équité (*according to law and equity*), et autant que faire se pourrait, suivant les lois anglaises, (*as near as may be, agreeably to the laws of England*). Il n'est pas permis, en présence d'une phraséologie aussi générale, aussi peu tranchée que celle-là, de violer toutes les règles de la logique, de la raison, de la justice, et de la loi, et assurer, comme on le fait, que les termes sont une déclaration formelle de la part du Roi, que les lois anglaises devenaient et seraient désormais les lois du Canada. Et certes, si le Roi seul en avait l'autorité, ce que je ne puis admettre, et s'il en avait l'intention, le désir et la volonté, qu'y avait-il de plus facile que de le dire ? Depuis quand, les souverains, surtout les conquérants, dans le sens qu'on a si étrangement attribué à la cession du pays, sont-ils si timides, et substituent-ils à l'expression de leur volonté, des termes aussi éloignés de l'opérer, que sont les mots "according to law and equity, and as near as may be agreeably to the laws of England ?" *According to law !* Quelle loi ? *Equity !* cela signifie tout ce que l'on veut, et aussi peu qu'on le désire—*as near as may be, agreeably to the laws of England !* Si on doit juger autant que faire se

pourra, suivant les lois anglaises, comment se fait-il qu'elles ont été introduites? Serait-ce donc pour laisser aux juges la liberté, suivant leurs caprices, de s'y conformer, ou de s'en écarter? Plus on tenterait de prouver en quoi de pareilles prétentions sont tout-à-fait illogiques et insoutenables, plus on s'exposerait à affaiblir sa position, car l'on risque toujours quelque chose, lorsqu'on s'attache trop à prouver ce qui est l'évidence même. Ainsi donc, non-seulement la Proclamation de 1763 ne justifie aucunement d'en inférer l'introduction en Canada des lois anglaises, mais elle n'autorise pas même l'induction logique et raisonnable que Sa Majesté Geo. III. ait eu l'idée de le faire. Et s'il m'était permis d'anticiper, je dirais de suite, que par l'Acte de 1774, (*Quebec Act*) l'on a législaté dans un sens inverse.

D'ailleurs, la Proclamation de 1763, n'était pas bornée à la Province de Québec, qui n'était qu'un des quatre gouvernements qu'elle établissait, je veux dire, les deux Florides et la Grenade, en sorte qu'il serait contre toute raison, d'appliquer d'une manière absolue, à la Province de Québec, ce qui, considérant les circonstances, et l'état de société dans ce pays alors, n'était aucunement en rapport avec les choses aux Florides et à la Grenade. Il y avait mille raisons d'admettre des modifications qui rendraient plus que ridicule les prétentions de métamorphoser en ordonnance absolue, et parfaitement effective, une proclamation qui n'a d'autre but et d'autre portée que d'exprimer un désir du Souverain, qui était, tout au plus, naturel, mais sans conséquence et sans suite.

Au reste, l'histoire du temps nous fait connaître ce que l'on pensait alors de cette Proclamation.

J'emprunte encore au rapport de Mr. le Procureur-Général Thurlow, les passages suivants, ils sont précieux—

.....“Three very different opinions have been entertained. There are those who think that the law of England,

in all its branches, is actually established, and in force in Quebec. They argue that your Majesty, upon the conquest, had undoubted authority to establish whatever laws should seem fittest in your royal wisdom; that your Majesty's Proclamation, dated the seventh day of October, 1763, was a repeal of the existing laws, and an establishment of the English laws in their place, in all parts of the new subjected countries; that the several commissions to hear and determine by the laws of England, were an actual and authoritative execution of those laws; and, that this law, as it prevails in the province of New York and the other colonies, took its commencement in the same way, and now stands on the same authority.

If Your Majesty should be pleased to adopt this opinion, it seems to afford a full answer to the whole reference, by exhibiting not only a general plan, but a perfect system of civil and criminal justice, as perfect as that which prevails in the rest of Your Majesty's dominion, or, at least, it leads off to questions widely different, touching the expediency of a general change in the established laws of a colony, and touching the authority by which it ought to be made.

Others are of opinion that the Canadian laws remain un-repealed. They argue that according to the notion of the english law, upon the conquest of a civilized country, the laws remain in force till the conqueror shall have expressly ordained the contrary. They understand the right acquired by conquest to be merely the right of empire, but not to extend beyond that to the liberty and property of individuals, from which they draw this conclusion, that no change ought to be made in the former laws beyond what shall be fairly thought necessary to establish and secure the sovereignty of the conqueror. This idea they think confirmed by the practice of nations and the most approved opinions. *Cum enim omne imperium victis eripitur relinqui illis possunt, circa-*

res privatas et publicas minores suæ leges, suique mores, et magistratus hujus indulgentiæ pars est, avitæ religionis usum victis, nisi persuasis non eripere, Grot 3, 15, 10. And if this general title to such moderation could be doubted, they look upon it to be a necessary consequence of the capitulation and treaty alluded to before, by which a large grant was made them of their property and personal liberty, which seem to draw after them the laws by which they were created, defined and protected, and which contain all the idea they have of either. This moderated right of war, flowing from the law of nations and treatise, they think may have some influence upon the interpretation of the public acts above mentioned.

Though the proclamation of the 7th October, 1763, is conceived in very large terms, generally enough to comprehend the settled countries together with the unsettled, yet the purview of it seems to apply chiefly, if not altogether, to the unsettled, where the laws of England obtain a course till otherwise ordered, for it seems to assume and proceed upon it, as manifest, that the laws of England are already in force, which could not be true of any settled country reduced by conquest. It also recites for its object that, "it will greatly contribute to the *speedy settling* our said new government;" and, at any rate, they think it too harsh a conclusion to be admitted that such an instrument in the state thereof, not addressed to the Canadians, nor solemnly published among them, nor taking any notice of their laws, much less repealing them, should be holden to abrogate all their former customs and institutions, and establish the English laws in every extent and to every purpose, as it may be thought to do in unsettled countries, which conclusion, however, they know not how to avoid, but by confining it to those countries where no settled form of justice existed before.

If it be true that the laws of England were not introduced into Canada by this Proclamation, they consider the

several commissions above mentioned, to hear and determine according to those laws, to be of as little effect, as a Commission to New York to hear and determine according to the laws of Canada.

..... Others again, have thought that the effect of the above mentioned Proclamation, and the acts that followed upon it, was to introduce the criminal Laws of England, and to confirm the civil law of Canada, in this number were two persons of great authority and esteem ; Mr. Yorke and Mr. De Grey, then Attorney and Solicitor General, as I collect from their report of the 14th April, 1766. One great source, they represent, of the disorder supposed to prevail in Canada, was the claim taken at the constructions put upon your Majesty's Proclamation of 1763, as if it were your Majesty's intention, by your Majesty's Judges and officers of that country, at once to abolish all the usages and customs of Canada, with the rough hands of a conqueror, rather than in the true spirit of a lawful Sovereign, and not so much to extend the protection and benefit of Your Majesty's English laws to your new subjects, by securing their lives, liberties and properties, with more certainty than in former times, as to impose new, unnecessary and arbitrary rules, especially in the titles to land, and in the modes of descent, alienation and settlement, which tend to confound and subvert rights instead of supporting them.

“ There is not a maxim of the common law more certain than that a conquered people retain their ancient customs till the conqueror shall declare new laws. To change at once the laws and manners of a settled country, must be attended with hardships and violence. And, therefore, wise conquerors, having provided for the security of their dominions, proceed gently, and indulge their conquered subjects in all local customs which are in their nature indifferent, and which have been received as rules of property or have ob-

tained the force of laws. It is the more material that this policy should be pursued in Canada, because it is a great and ancient colony, long settled and much cultivated by French subjects who now inhabit it, to the number of eighty or one hundred thousand.

In criminal cases, whether they be capital offences or misdemeanors, it is highly fitting, so far as may be, that the laws of England should be adopted, in the description and quality of the offences itself, in the manner of proceeding to charge the party, to bail or detain him, to arraign, try, convict or condemn him. This certainty and lenity of the English administration of justice, and the benefits of this constitution, will be more peculiarly and essentially felt by His Majesty's Canadian subjects, in matters of crown law, which touch the life, liberty and property of the subjects, than in the conformity of Your Majesty's Courts to the English rules in matters of tenure, or the succession and alienation of real and personal estate. This certainty and this leniency are the benefits intended by Your Majesty's royal proclamation as far as concerns judicature."

Messrs. York et De Grey parlent énergiquement dans le même sens, comme il est facile de s'en convaincre, en référant à leur rapport du 14 avril 1766, dont je m'abstiendrai de faire des extraits, pour éviter des longueurs et les redites. On le trouve au 1er. Vol. de l'histoire du Canada, par Smith, p. 29, *et seq.*

Telles sont les vues qu'avaient des hommes distingués par leur position et leur mérite, sur le caractère, le but et la portée de la Proclamation de 1763. Cela est d'autant plus remarquable, qu'à cette époque on devait tout naturellement avoir des idées un peu exagérées vis-à-vis d'un pays qu'on regardait comme conquis.

Sans parler ici de l'énormité de l'injustice qu'il y aurait eu, et de l'acte barbare et de vandalisme dont l'Angleterre se

serait souillée, si d'un coup de plume elle eût effacé les lois, les usages, les droits et tout ce qu'il y avait de plus cher à un peuple qui n'avait d'autre tort que celui d'avoir vaillamment combattu pour un gouvernement, le plus immoral, le plus égoïste et le plus lâche que l'on pût imaginer, et qui sourd à son devoir et à l'honneur français, s'est vu, à sa honte, s'il en était susceptible, enlever un pays magnifique, après en avoir indignement abandonné les braves habitants qu'il aurait du protéger et défendre, s'il eût mis à cet acte de justice, d'honneur et d'humanité, les sommes immenses que leur roi, le sardanapale des temps modernes, dépensait dans les orgies les plus dégradantes, et à gratifier les goûts et alimenter les excès de maîtresses bien dignes de lui, sans parler, dis-je, de l'acte de vandalisme qu'eût, ainsi, commis l'Angleterre, n'est-il pas contraire à tout principe, de reconnaître dans un monarque, le premier magistrat de l'empire, et rien de plus, le droit de faire, ce que d'après le *droit des gens*, le parlement entier de la Grande-Bretagne n'aurait pas même songé de faire, et n'aurait consommé qu'en foulant aux pieds, l'honneur et l'humanité—Et ce serait vouloir que ce magistrat qui exécute, mais ne fait pas, à lui seul les lois, exerçât vis-à-vis d'un pays établi et un peuple civilisé, ce qu'il a à peine le droit de déclarer au nom de la nation qu'il gouverne, lorsqu'il s'agit de territoires non habités. Jamais pareille idée ne peut être accueillie dans un pays où nous connaissons nos droits, comme nous reconnaissons et savons respecter ceux des autres.

Il est donc certain qu'en 1763, les lois françaises, c'est-à-dire, les lois du pays, étaient dans leur intégralité.

De 1763 à 1774, les choses demeurent dans cet état.

Il faudrait donc, pour justifier la prétention qu'on met en avant, relativement aux *Townships*, trouver quelque part,

l'abolition des lois du pays, quant à une section quelconque de ce pays.

On a avancé que l'acte impérial de 1774, c. 83, (le *Quebec Act*) renferme des dispositions qui décident la question ; examinons le :

D'abord la sec. 4e, en parlant des habitants du pays, a les termes qui suivent : “ And enjoying an established form of constitution, and system of laws by which their persons and property had been protected, governed and ordered for a long series of years, from the first establishment of the said Province of Canada.”

Comme on le voit, cette section du statut impérial, est loin d'annoncer un doute sur l'existence des lois du pays, à cette époque ; et il s'en faut qu'on y trouve quoique ce soit qui confirme l'étrange interprétation qu'une arrière pensée a porté certains hommes de parti en Canada, d'attribuer à la proclamation de 1763 : ce n'était que du réchauffé.

Quoiqu'il en soit, ou puisse être, toujours est-il vrai, que par cette sec. 4e., la proclamation est de plus mise de côté : n'en parlons plus.

La sec. 8e est aussi emphatique que possible, la voici :

“ And be it further enacted by the authority aforesaid, that all His Majesty's Canadian subjects within the Province of Quebec, the religious orders and communities only excepted, may also hold and enjoy their property and possessions, together with all customs and usages relative thereto, and all other their civil rights, in as large, ample and beneficial manner, as if the said proclamation, commission, ordinances, and other acts and instruments had not been made, and as may consist with their allegiance to His Majesty, and subjection to the Crown and Parliament of

Great Britain ; and that in all matters of controversy relative to property and civil rights, resort shall be had to the laws of Canada, as the rule for the decision of the same : and all causes that shall hereafter be instituted in any of the Courts of Justice, to be appointed within and for the said Provinces by His Majesty, his Heirs and Successors, shall with respect to such property and rights, be determined agreeably to the said laws and customs of Canada, until they shall be varied or altered by any ordinance that shall from time to time be passed in the said Province by the Governor, Lieutenant-Governor, or Commander in Chief, for the time being, by and with the advice and consent of the Legislative Council of the same, to be appointed in manner hereinafter mentioned."

Cette section a rapport à tous les sujets Canadiens de Sa Majesté, "*All His Majesty's Canadian subjects within the Province of Quebec.*" Il n'y a d'exception qu'à l'égard des ordres religieux et des communautés, "*the religious orders and communities only excepted.*"

D'après quel procédé et quelles règles peut-on faire qu'une section qui parle de *toute* une province et de *tous* ses habitants, dont les ordres religieux et les communautés seuls sont exceptés, n'a rapport et ne s'entendra que d'une section de cette province, et d'une partie de ses habitants ? La chose est insoutenable ; aussi se rejète-t-on sur le *proviso* qu'on lit en la Sec. 9e.

"Nothing in this Act contained shall extend, or be construed to extend, to any lands that have been granted by His Majesty, or shall hereafter be granted by His Majesty, His Heirs and Successors, to be holden in free and common soccage."

Cette clause est mal exprimée, la phraséologie en est indéfinie ; elle se rapporte à tout l'acte. "Nothing in this Act contained, &c."

Si l'intention était de faire rapporter le proviso à la section précédente seulement, il eût été facile de le faire.

Dans la supposition où la cour serait justifiable, (ce que je nie) de restreindre à une seule clause, ce qui, en termes exprès, a rapport à l'acte entier, alors la seule portée que l'on puisse raisonnablement attribuer aux termes de ce proviso, (Sec. 9) c'est que les lois qui ont rapport à la tenure seigneuriale ne s'appliqueront point aux terres concédées, ou à être concédées, *en franc et commun soccage*.

Si les cours prenaient sur elles d'étendre la signification des mots, et de déclarer qu'ils signifient au-delà de ce qu'il est raisonnable de leur attribuer, et cela dans le but de donner suite à ce proviso, alors, il n'y a pas de choix, et il faut, sans balancer, dire, ou que ce proviso affecte tout l'acte, ou que tout ce qui se trouve dans la clause 8e est sans application aux sections du pays, où il y a des terres tenues *en franc et commun soccage*. Si ce proviso affecte tout l'acte, alors, il le détruit, et entre autres conséquences il résulterait :

1. Qu'une loi qui est faite pour *toute* la province, ne s'appliquerait qu'à une partie de la province.

2. Que la section 5e qui garantit le libre exercice de la religion catholique romaine dans la province de Québec, n'aurait aucun effet dans les townships où les terres sont tenues *en franc et commun soccage*, et que là, cette religion ne devrait pas être tolérée.

3. Qu'il en serait ainsi de la section 6e, quant à certaines allocations à faire par Sa Majesté, pour le soutien d'un clergé protestant, là où il y aurait des terres tenues *en franc et commun soccage* : conséquence absurde, mais irrésistible.

4. Que dans les *townships*, les catholiques ne seraient pas tenus de prêter le serment d'allégeance.

5. Que dans les *townships*, les canadiens n'auraient droit à aucune protection dans leurs droits de citoyens.

6. Que dans les *townships*, l'aliénation par testament, suivant les lois anglaises, serait impossible et non permise, 10e section.

7. Que les lois criminelles garanties par la section 11e, n'auraient point de force dans les *townships*.

8. Que le conseil constitué "pour faire des règlements pour le bonheur et le bon gouvernement de la province de Québec," n'aurait jamais eu le droit de faire ses règlements pour les parties ou sections de la province de Québec où s'étendait la tenure en *franc et commun soccage*, en sorte que les lois de la législature d'alors n'auraient eu de force que dans les seigneuries.

9. Que les ordonnances du conseil, dont la sec. 14e exige l'envoi dans l'espace de six mois, par le gouverneur, &c., pour être soumise à Sa Majesté, afin d'obtenir son approbation, seraient lois pour les *townships*, sans cette formalité, laquelle serait de rigueur dans les seigneuries.

10. Que les ordonnances concernant la religion, ou autres, par lesquelles il pourrait être infligé une peine plus forte qu'une amende, ou un emprisonnement de trois mois, seraient lois dans les *townships*, du moment de leur promulgation, mais n'auraient aucune force dans les seigneuries jusqu'à ce qu'elles eussent reçu l'approbation de Sa Majesté, comme l'exige la sec. 15e.

11. Que la Sec. 17me au sujet de la réserve faite du droit des nominations des juges, établissement de cours de justice &c., serait inapplicable dans les *Townships*, et que là, Sa Majesté n'aurait aucun droit d'établir des cours, juges ou officiers quelconques.

Il s'ensuivrait enfin—

12. Que la sec. 18^{me} n'aurait aucune force ou vertu de réserve quant aux *Townships* où les lois du Parlement de la Grande-Bretagne, concernant le commerce &c., seraient sans force.

En voilà, assurément, assez pour faire toucher du doigt à qui veut réfléchir, la parfaite nullité de la sec. 9^{me}, si on la prend telle qu'on la trouve.

Dans la 2^e thèse que j'ai posée, il y a au moins de la raison, puisque l'on refuse d'appliquer à la partie seulement, ce que la section même déclare emphatiquement se rapporter au tout. La seule interprétation permise, et elle n'est raisonnable que parcequ'elle ressort de la nature même de l'objet dont il y est question, c'est que ce qui, du droit Français a rapport à la tenure seigneuriale, ne s'applique pas aux terres concédées ou qui le seront, en franc et commun socage.

Il résulte de ce qui précède que l'acte impérial de 1774, n'a pas introduit les lois Anglaises dans les *Townships*.

Une observation générale suffira pour le prouver encore plus clairement, s'il est possible. Est-il un homme de loi, en Canada, qui soit disposé à se compromettre au point de dire, que le corps *entier* des lois Anglaises a été introduit dans les *Townships*. Or, si la sec. 9^{me} de l'acte de 1774 n'a pas eu cet effet, quelle est donc la partie, ou les parties des lois de l'Angleterre, qui a été, ou ont été introduites dans les *Townships*. La question devient, à ce compte là, encore bien plus compliquée, tellement compliquée, qu'en y réfléchissant tant soit peu, l'on recule devant les conséquences ruineuses qui auraient été la suite d'une anomalie aussi impraticable, et de l'état de choses effrayant qui en fût résulté, et contre lequel, les populations des *Townships* se seraient élevées, et s'élèveraient aujourd'hui en masse, pour de-

mander à grands cris qu'on substituât quelque chose de certain et d'intelligible, à un amas de règles incohérentes résultant de statuts multipliés, innombrables, contradictoires, sans application, et que les jurisconsultes du pays eux-mêmes ne comprennent pas parfaitement.

Au reste, le jugement que je porte sur l'effet de ces lois, si on les reconnaissait à ce point, ne m'est pas particulier.

“ To introduce (disent Messrs. York et De Grey, dans leur rapport au Roi, du 14 Avril 1766) at one stroke, the English law of real estates, with english modes of conveyancing, rules of descent, and construction of deeds, must occasion infinite confusion and injustice. British subjects, who purchase lands there, may, and ought to conform to the fixed local rules of property in Canada, as they do in particular parts of the realm, or in the other dominions of the Crown.”

C'était bien ainsi que l'envisageaient le Gouverneur Carleton et son Conseil, comme on peut s'en assurer, par le rapport du 28 Avril 1767, qu'ils firent à Sa Majesté, d'après l'ordre qu'ils en avaient reçu.

Et lors de la demande que firent les habitants du Canada, à la mère-patrie, d'une forme constitutionnelle de gouvernement, la pétition qu'ils présentèrent, (et comme on le dit, les hommes qui marchaient en tête de ce mouvement étaient d'origine bretonne) renfermait ce qui suit :

4. That the ancient laws and customs of this country respecting lands and estates, marriage settlements, inheritances and dowers be continued, &c.”

Be continued, dirent-ils, non pas *restored*, non plus qu'*introduced*, &c., mais *be continued*, par la raison toute simple que ces lois étaient le droit du pays.

Je crois donc pouvoir dire qu'il ne paraît pas que l'Angleterre ait jamais songé à émettre les prétentions exagérées

qui ont vu le jour en Canada, au sujet des lois anglaises. Plus tard, lorsqu'il fut question de diviser en deux la Province de Québec, Mr. Pitt s'exprima de manière à dissiper, s'il en avait existé, tout doute à ce sujet. Le but du gouvernement anglais était d'assurer la suprématie des lois anglaises dans le Haut Canada, et celle des lois françaises dans le Bas Canada, la raison en devait être, entre autres, celle donnée par York et De Grey, dans leur rapport dont j'ai déjà eu occasion de parler plusieurs fois.

“British subjects who purchase lands there, may and ought to submit to the fixed local rules of property in Canada, as they do in particular parts of the realm, or in the other dominions of the Crown.”

En introduisant le bill dans la chambre des communes, voici comment s'exprime Mr. Pitt : “The division of the Province into Upper and Lower Canada, he hoped, would put an end to the competition between the old french inhabitants and the new settlers from Britain and the british colonies : this division, he trusted, would be made in such a manner as to give each a great majority in their own particular part, although it could not be expected to draw a complete line of separation. Any *inconveniences* however, to be apprehended from ancient Canadians being included in the one, or British settlers in the other, would be averted by a local legislature to be established in each.”

Je ne puis mieux faire, et c'est mon dernier mot sur l'Acte de 1774, que de citer ce qu'en dit l'historien Mr. Smith, dont les vues sur une question comme celle-ci ne seront jamais aperçues par les gens instruits, à travers un prisme fait exprès pour les refléter sous un jour trop favorable aux justes prétentions des anciens habitants du pays. Dieu me garde de faire à Mr. Smith, dont je respecte la mémoire, un reproche de ce qu'il avait, sur les affaires du pays et sur certains droits

d'une portion considérable de ses habitants, des opinions que nombre d'autres, placés comme il l'était lui-même, avaient sans doute avoués : je fais la part des temps et des circonstances. Et c'est parceque je reconnais chez lui ce que je réclame pour moi-même, et pour tout autre, quel qu'il soit, une liberté, sans contrôle aucun, de penser et d'exprimer nos opinions sur quelque sujet que ce soit, que je cite avec confiance ce qu'il a écrit, et que j'attribue, sans difficulté, à une conviction parfaite chez lui, qu'il disait la vérité, puisque je dois cet hommage à sa mémoire. D'ailleurs, moi aussi, qui ai le droit et la liberté de penser et de dire ce que je pense, je vois, comme le voyait Mr. Smith, l'acte de 1774.

“ The Quebec Act restored, (dit-il à la p. 69, s. 1.) the municipal laws of France as to civil rights in Canada, established also the best of all criminal jurisprudence, the criminal laws of England.”

Et à la p. 73, “ The main scope of the Quebec Act, was to extend the boundary of the Province.....to establish the French laws ; to take away the trial by jury in civil cases ; to establish the criminal laws of England ; and to secure to the catholic clergy their estates and tithes.”

Pas un mot du proviso de la sec. 9e., au sujet des terres concédées, ou à l'être, en franc et commun soccage. Et certes, la chose valait bien la peine qu'on en parlât, et Mr. Smith n'aurait pas été en défaut, si l'on eût imaginé alors de donner à ce proviso l'étrange interprétation qu'on lui donne aujourd'hui.

Cette opinion de Mr. Smith, et quelle autre pouvait-il en avoir sur l'effet de l'Acte de Québec, non pas pour les seigneuries seulement, mais dans tout le Canada ? *in Canada*, cette opinion, dis-je, me fait voir, qu'à cette époque, la nuance la plus naturellement opposée à ce qu'il en fût ainsi, était, comme je le suis moi-même d'avis, que les lois fran-

çaises et non les lois anglaises, étaient alors le droit commun du pays.

Or, comme depuis l'acte impérial de 1774 jusqu'à 1826, il n'y a eu, soit en Canada, soit en Angleterre, aucune législation qui puisse aucunement ébranler l'édifice bien appuyé du système de nos lois civiles, dont l'arbre gigantesque a pris racine à Rome même, dont le tronc s'est étendu sur les Gaules, et dont les branches et le feuillage nous recouvrent, nous arrivons à 1826, époque à laquelle a été passé dans le parlement impérial, l'acte des tenures, 6 Geo. IV, c. 59, que l'on prétend être un acte déclaratoire qui a la vertu de trancher toutes les difficultés.

Je suis tellement convaincu que jamais les lois civiles Anglaises n'ont été introduites en Canada, j'en trouve la preuve si conclusivement faite par ce qui précède, qu'il m'est impossible d'admettre le doute en cette matière. Je ne puis, par conséquent, reconnaître au Parlement Impérial le droit d'intervenir et entreprendre d'introduire, par l'effet d'une clause intercalée dans un acte législatif en 1826, des lois civiles qui n'ont jamais fait partie de celles qui nous ont régi jusqu'alors.

Le Parlement Impérial eût-il le droit de législater sur de tels objets, ce que je répudie sans difficulté, il est impossible, toutefois, qu'il ait la puissance de faire que ce qui n'a jamais été, ait existé, de même que ce qui n'a jamais eu d'existence, en ait eu. Dieu lui-même ne le peut, et l'on veut que le Parlement Impérial le puisse. Il faut avouer que c'est porter un peu loin la complaisance et la confiance, il faut un degré de foi qui dégénère en abjection.

Ne s'aperçoit-on pas, que si, en présence des traités et des capitulations, et d'une déclaration aussi formelle, aussi emphatique, aussi solennelle que celle que renferme l'acte Impérial de 1774, sec. 8me, "And all causes &c., shall with

respect to such property and rights, be determined agreeably to the said laws and customs of Canada, *until* they shall be varied or altered, by any ordinances that shall, from time to time, be passed in the said province, by the Governor &c., &c., &c.” Ne s’aperçoit-on pas dis-je, que si l’on admettait, pour un instant, la prétention que le Parlement Impérial a pu constitutionnellement et légalement statuer, comme on dit qu’il l’a fait en 1826, on admettrait par là-même que sous le prétexte qu’on aurait élevé des doutes là où il n’y en avait pas, le Parlement Impérial réglerait, sans appel, et en dernier ressort, ce qui est loi, ce qui l’a été, et déciderait, *ex cathedra* que les lois garanties après avoir été accordées, ne l’ont pas été, qu’on s’est trompé, que l’erreur a donné lieu à cette croyance, et que désormais les lois qu’on pensait notre règle, ne le sont pas, et que tout doit être regardé comme affranchi, par le passé même, de l’effet de ces lois ?

Ne voit-on pas de suite où nous mènerait une complaisance aussi grande que celle-là ? Ne touche-t-on pas du doigt qu’une fois la concession faite à l’Angleterre d’intervenir de la sorte dans notre système de lois, il n’y a plus de sûreté, plus de garantie, plus de droit ? les droits acquis disparaissent pour faire place à une législation d’outremer que la colonie ne peut, ne doit pas admettre, sans tout sacrifier.

Je sais que l’opinion que j’exprime, ne sera pas de nature à édifier nombre de personnes qui se pensent tenues de fléchir le genoux devant les oracles de la Mère-Patrie ; mais quant à moi, je ne connais qu’une règle, c’est le devoir, et comme juge, je ne puis m’incliner en présence d’un pouvoir qui, quelque élevé, quelque puissant qu’il soit, ne l’est pas encore assez pour faire disparaître les traités et les actes les plus solennels, et faire plus que la divinité même ne peut accomplir, faire que ce qui n’a jamais eu d’existence, ait été. Je repousse cette idée, je repousse, de même, cette prétention

flétrissante, dégradante, que désavouent également la raison et la justice.

Si j'admettais la légalité de pareille intervention de la part de la législature impériale, ça ne serait, tout au plus, que dans ce qu'elle ferait *prospectivement*, et là même, je ne puis m'incliner en présence d'un corps, qui, tout colossal qu'il soit, ne m'en impose pas encore au point de m'obliger de reconnaître comme légal, ce qui ne serait qu'une assumption de pouvoir, et rien de moins. Les raisons que j'ai données plus haut, pour faire toucher du doigt, l'énorme renversement des droits acquis, qu'amènerait une telle législation d'outre mer, si nous étions assez serviles pour la recevoir, quant au passé, ont une égale application quant au futur; et je répudie, sans hésitation, une prétention aussi exorbitante que serait celle de l'Angleterre, de porter atteinte sous une autre forme, à des droits acquis en vertu de ce qu'il y a de plus solennel chez les peuples. Si j'avais à discourir ici, sur la partie morale d'une telle législation, et qu'il fût nécessaire d'emprunter à l'honneur et à l'honnêteté des motifs, en dehors des considérations légales et constitutionnelles plus puissantes que celles dont j'ai parlé plus haut, je n'en finirais pas. J'ai préféré et dû me borner au sujet qui n'est, assurément, que trop fertile. Je me contenterai d'ajouter que cette partie de l'acte des tenures (sec. 8 de l'acte Imp. 6 Geo. 4, c. 59) a été glissée, *assez singulièrement*, dans une loi qui avait pour objet, toute autre chose que d'être un acte déclaratoire, et dont le titre est "An Act to provide for the extinction of feudal and seigniorial rights and burthens, on lands held *à titre de fief* and *à titre de cens*, in the Province of Lower Canada, and for the gradual conversion of those tenures into the tenure of free and common soccage, and for other purposes relating to the said Province." Dans le cas même où je ferais taire mes convictions, et que paralysant ma langue, je me prosternerais en esclave, devant la législature impé-

riale, pour la remercier de nous arracher ce qu'elle nous aurait donné, encore, serais-je pleinement en droit de repousser intérieurement et mentalement cet acte, qu'on a tout le tort possible de vouloir nous faire regarder comme un acte déclaratoire : il n'en est pas un, et le fût-il, en répudiant, comme je le fais, cet acte, et ne lui attribuant aucune des vertus qu'on lui prête, mon dernier mot à ce sujet, le voici : la sec. 8e de l'acte 6 Geo. IV, c. 59, n'a aucunement porté atteinte à nos lois civiles, il est sous ce rapport, sans aucun effet.

J'ajouterai que bien que l'acte des tenures ait été passé par le Parlement Impérial, qu'il soit censé son fait, il faudrait peu connaître ce qui se fait dans les législatures, et ignorer les expédients auxquels ont recours, souvent, des intrigants et des personnes intéressées, pour introduire furtivement, dans les lois qui ont pour objet de législater sur toute autre chose, des clauses qui ont l'effet, ou auxquelles ces individus voudraient attribuer une vertu bien grande, celle de consommer des œuvres d'iniquité qu'ils n'ont, souvent, ni la franchise, ni le courage d'avouer ouvertement. Cela se fait ailleurs qu'en Angleterre. Ainsi, donc, l'acte des tenures n'est pas même, quant aux lois anglaises, un acte déclaratoire, au degré qu'on le prétend.

Supposant même que l'acte des tenures ait eu l'effet de régler conclusivement trois ou plusieurs choses, par exemple, *dower, conveyance and descent*, et que l'acte provincial de 1829 n'ait pas affecté l'acte des tenures, (ce qui est le cas, vu qu'il n'a pas été sanctionné dans les deux ans) il ne s'ensuit qu'une chose de deux :

Ou de tout temps depuis que le pays appartient à l'Angleterre, les lois anglaises ont, dans les *Townships*, réglé le *dower, descent and conveyance*, et rien de plus ;

Ou ces lois anglaises ne règlent ces trois objets que depuis la passation de l'acte des tenures, si toutefois l'acte Provincial de 1829, n'a pu l'affecter.

Il s'ensuit :

Que dans un cas, comme dans l'autre, le corps entier des lois anglaises n'a jamais été introduit dans les *Townships*. La forme de *conveyance* serait bien, à la vérité, réglée d'après le droit anglais, mais une fois l'acte fait ses conséquences seraient à déduire, et ses effets à mesurer sur le droit du pays. Il en est de cela comme des testaments faits suivant les formes anglaises, les biens se répartissent suivant le droit français, ou si l'on veut, le droit du pays. Mais je désire qu'on me comprenne bien, je ne puis reconnaître au *tenures act*, l'effet d'avoir même pour les trois objets (*dower, conveyance and descent*), introduit pour le temps passé, les lois anglaises, dans les townships.

Si cela est correct, les actes en vertu desquels les demandeurs réclament des droits, en cette cause, ne peuvent acquérir plus de force, et avoir plus d'effet qu'ils n'en eussent eut, si cette loi (*tenures act*) n'eût pas été passée par le Parlement Impérial.

Dans la thèse de l'introduction dans les *townships*, soit du corps entier du droit civil anglais, ou de tout ce qui, du droit anglais, a rapport au *dower, conveyance and descent*, où en serait-on, même dans les *townships*? Comment pourrait-on jamais administrer tout ce droit? Il serait même ridicule d'entreprendre une chose aussi impraticable.

Il y avait bien de la vérité dans ce que le juge *Kerr* observa, une fois, dans une séance du Conseil Législatif, au juge en chef *Sewell*, sur l'impraticabilité d'une telle chose, et sur ce qu'il n'y avait pas un seul juge en Canada, qui

fût en état de déclarer qu'il y avait moyen d'administrer de telles lois.

Et on voudrait calmer les craintes, et faire disparaître les difficultés, en disant que ce que les Juges ne comprendraient pas, et ne seraient pas capables d'appliquer, ni d'administrer, serait le flambeau qui éclairerait les masses, au milieu des ténèbres sur leurs lois, dans les Townships, impossible.

L'Acte Provincial de 1829 n'affecte pas la question, vu qu'il n'a pas été sanctionné dans les deux ans, d'après l'acte constitutionnel de 1791.

Cet acte fut présenté pour la sanction royale,
et réservé le..... 14 Mars, 1829.

Il ne fut sanctionné par Sa Majesté, en Conseil, que le..... 11 Mai, 1831.

Il fut annoncé par Proclamation en Canada le 1 Sep. 1831.

Le parlement impérial, dans sa toute-puissance qui dans l'acception familière n'a de limites que de ne pouvoir faire qu'un homme soit une femme, ne peut pas non-plus au sérieux, faire par le statut 1, Guillaume 4 c. 20, que ce qui a de fait existé, n'ait pas existé, non-plus que ce qui n'a pas existé, ait existé. Or l'acte constitutionnel de 1791 ayant formellement statué qu'une loi provinciale réservée pour la sanction royale, et qui n'aura pas été sanctionnée dans les deux ans de sa présentation au gouverneur, pour la sanction royale, ne sera pas loi, elle devient une nullité. " And that no such Bill, which shall be so reserved as aforesaid, shall have any force or authority within either of the said provinces respectively, unless His Majesty's assent thereto shall have been so signified, as aforesaid, within the space of two years from the day on which such bill shall have been presented for His Majesty's assent, to the Governor, Lieutenant-Governor, or person administering the Government of such

Province." Act Imp. 31e Geo. III, c. 31, sec. 32. Le parlement impérial pouvait bien dire qu'à l'avenir, malgré la clause de l'acte constitutionnel, Sa Majesté pourrait par sa sanction, même après les deux ans, prolonger la vie, à ce qui, sans cela, cesserait de l'avoir, c'est sans doute, ce qu'il a fait, mais, jamais le parlement impérial, par un acte qui ne réfère pas d'une manière directe à l'acte provincial en question (celui de 1829), y eût-il même référé, n'a pu faire que ce qui était mort, fût vivant, que ce qui était nul, fut accompli, devint valide et eut une existence. C'est d'abord, une contradiction *in terminis*, c'est de plus, vouloir que le parlement impérial statue que le Roi fasse une impossibilité.

Il s'ensuit que si le statut impérial veut dire cela, il a dit ce qui n'est pas possible, et que s'il n'a dit ni voulu dire telle chose, le Roi, en donnant sa sanction à un acte qui n'était plus un acte, mais une nullité parfaite, a tenté une impossibilité ; il a fait, de son autorité privée, ce qu'il n'avait aucun droit de faire.

Il résulte de tout cela, que l'acte provincial de 1829 ne pouvant affecter l'acte impérial des tenures, il faudrait, avec les modifications mentionnées plus haut, le limiter, dans tous les cas, aux trois objets dont il a été parlé ci-devant. Bien entendu, dans la supposition que le Parlement Impérial eût eu le droit d'intervenir comme il l'a fait, par l'acte 6 Geo, IV, c. 59, sec. 8, ce que je nie plus fortement que jamais.

Si, par hasard, en l'absence de toute bonne raison, on m'opposait que la Législature du Bas Canada a reconnu ce droit d'intervention, je me contenterais de répondre que cela prouverait, tout au plus, qu'elle a eu tort, et que deux erreurs ne font jamais une vérité.

Et pour faire toucher du doigt le peu de logique qu'il y aurait à tirer des conséquences de prémisses aussi lumineuses, il me suffirait, sans doute, de référer les avocats et

le barreau en général, à l'ordonnance du Conseil Spécial, 2 Vict. c. 51, qui révoque une certaine ordonnance, intitulée : " Ordonnance pour déclarer que le second chapitre du Statut du Parlement d'Angleterre, passé dans la trente-et-unième année du règne du Roi Charles Second, n'est pas, ni n'a jamais été en vigueur en cette Province, et pour d'autres fins."

C'est ainsi que la Législature d'alors déclara sérieusement par une Ordonnance 2 Vict. c. 15, que l'Acte de l'*Habeas Corpus* (31 Chas. II, ch. 2,) n'avait jamais été en vigueur en Canada, et par une autre Ordonnance (2 Vict. c. 51,) le Conseil Spécial, par sa toute-puissance " Attendu qu'il convient, d'après les circonstances, de révoquer une certaine Ordonnance, &c." révoque la première, et permet au pays de repasser sous l'empire de l'Acte Impérial 31, Chas. II, c. 2.

Je pourrais, si le temps me le permettait, citer d'autres Actes de législation aussi logiques que celui-là, pour faire voir qu'il vaut mieux s'en tenir à des principes fixes, avoués par la raison et la loi, que de fonder, je ne dirai pas des raisonnements, mais toute autre chose que des raisonnements, sur des bases aussi fragiles que l'est souvent l'expression d'une opinion ou d'une résolution par un corps quelconque. Ce que j'avance là est une vérité qui est parfaitement philosophique, et hautement proclamée par l'expérience de tous les temps.

Au reste, je ne suis pas plus disposé de me prosterner en présence des Actes du Parlement Provincial, qui reconnaîtraient au Parlement Impérial des droits qu'il ne possède pas, que de m'incliner en silence devant les décrets de la Législature Impériale, en une matière qui n'est pas de son ressort, et sur laquelle elle n'avait pas assurément plus de droit, en 1826, de violer ses garanties et les droits acquis, que de fouler aux pieds en 1774 le *jus gentium*, chose qu'elle n'a jamais, alors, eu l'idée même de tenter.

Les raisons puissantes, qui avaient tant de force dans la bouche des hommes d'état à l'époque entre la Proclamation de 1763 et l'Acte Impérial de 1774, et sur lesquelles l'Acte de Québec a été calqué, ont bien plus de force aujourd'hui qu'elles n'en avaient alors, puisqu'à une période si rapprochée de la victoire, l'Angleterre reconnaissait des principes d'une éternelle justice, qu'une possession de 52 ans (1774 à 1826,) n'a certainement pas pu avoir l'effet d'affaiblir.

Ainsi donc, sous quelque point de vue qu'on se représente la question, qu'on se reporte en 1774, ou en 1826, ou même en 1829, toujours elle nous offre la même solution ; les lois civiles Anglaises n'ont jamais fait partie des lois de ce pays, pas même pour les terres tenues *en franc et commun soccage*, sauf, que de la nature même des choses, et inévitablement, les lois qui règlent la tenure seigneuriale sont sans application à la tenure *en franc et commun soccage* ; et que s'il résultait de l'Acte des Tenures aucune modification à nos lois de propriété, même dans les *Townships*, ce que je nie absolument, ces modifications n'auraient j'amaï pu affecter les droits acquis, et ne pourraient être regardées que comme règles de droit à appliquer prospectivement seulement, mais jamais rétroactivement.

Au reste, dans la supposition même où l'acte 10 et 11 G. 4 c. 77, (1829) pût produire quelque effet, il suffit de le lire pour se convaincre que son contenu entier a pour objet principal de consolider les lois du pays, même à l'égard des terres tenues *en franc et commun soccage*, soit par rapport à la forme des titres tant avant que depuis cet act, (1829), les hypothèques créées dès avant ou depuis, et quant à la répartition de ceux qui en ayant *en franc et commun soccage*, seraient décédés sans avoir fait de testament.

Je ne vois pas après tout, que qui que ce soit puisse regretter que le corps des lois civiles de l'Angleterre n'ait pas été

introduit en Canada. Toute personne instruite sait, que tout excellent, sous nombre de rapports que soit, en Angleterre, le système des lois qui y existe, et qui est en nombre de choses en harmonie parfaite avec le génie du peuple qui y est soumis, et des belles institutions dont il a bien droit de s'enorgueillir, il serait hors de mise de greffer sur l'arbre social, politique et légal du Canada, des rejettons qui loin de lui communiquer une vie nouvelle, ou même de la force et de la vigueur, le ferait dessécher et dépérir. En Amérique, où le cœur et les bras font disparaître les forêts et surgir les villes comme par magie, l'on comprend facilement combien il importe que chaque homme qui a mis la main à la coignée participe aux avantages résultant de ce travail commun, au lieu de s'en voir ravier, quelque fois la plus belle portion, par un fils aîné, dont tout le droit à se revêtir des dépouilles de ses frères et sœurs, ne lui vient que de devoir au hasard d'être le premier, d'un grand nombre d'enfants, qui a vu le jour.

Les habitants des Townships sont bien heureux qu'il n'en soit pas ainsi sur notre terre d'Amérique ; et ils peuvent remercier le Ciel et l'Angleterre de ce que non seulement, ils ne sont pas pressurés par les lois de primogéniture, mais qu'ils sont affranchis de nombres d'autres lois de formalités, de technicalités &c., auxquelles ils comprendraient autant ou aussi peu que nombre d'autres, qu'une étude de toute leur vie ne rend pas même habiles à débrouiller complètement : qu'ils se réjouissent, en commun avec tous ceux qui, libres de préjugés, connaissent et savent apprécier les avantages inestimables dont nous jouissons tous en commun, et dont nous avons, assurément, bien le droit de nous glorifier, je veux dire, l'avantage d'être soumis à l'empire de deux systèmes de lois que nous devons respectivement aux deux premières nations de l'Europe : les sages lois criminelles de l'Angleterre et le mode humain de les administrer, et les lois

civiles de la France et la procédure philosophique qui s'y rattache, et qui peuvent, sans crainte du résultat, être mises en juxtaposition avec les lois civiles anglaises dont Messrs. Yorke et De Grey nous donnent une idée.

“To introduce, at one stroke, the english law of real estate, with english modes of conveyancing, rules of descent, construction of deeds, must occasion infinite confusion and injustice.”

Il faut voir maintenant :

1. Si d'après les lois du pays, les lois françaises, quant aux droits de propriété, le demandeur a prouvé une possession de 30 ans.

Les demandeurs font remonter leur droit à la Patente du 27 Novembre, 1799, accordée par Sa Majesté à John Robertson.

Il est à peine nécessaire de dire, en passant, que depuis la passation de l'acte de Québec, il peut y avoir un doute légitime quant à l'effet d'une Patente, par rapport à ce que l'on entend par *delivery of seizin* ; cependant, je n'insisterai pas sur ce point, car il me paraît plus à propos de reconnaître, que quant au *Patentee*, le *delivery of seizin* s'opère de suite, mais je nie que cette fiction puisse, en ce pays, s'étendre au-delà.

Le 15 Octobre 1804, John Robertson vend à Patrick. Celui-ci, ne paraît pas avoir jamais fait acte de possession. Il meurt. Neil lui succède. Il meurt le 18 Juin, 1813. Les demandeurs prouvent que Mr. Sutherland a possédé (de 20 à 30 ans) comme curateur à la succession vacante de Niel qui a renoncé. Il n'y a pas, à la vérité, de renonciation à la succession, de produite, bien que par la requête, le fait apparait. Mais, dans tous les cas, les demandeurs produisant la curatelle, pour établir une continuité de possession, ils ne peuvent la dénaturer. C'est leur propre titre, cette curatelle qu'ils

produisent ; que prouve-t-elle ? Que les auteurs de l'épouse du demandeur n'étaient plus possesseurs, puisque la succession était vacante. Si les actes de possession du curateur valent quelque chose, ils ne valent plus pour les auteurs des demandeurs, bien qu'ils pussent devenir utiles aux créanciers ou à d'autres, peut-être. Le chaînon est arraché à la chaîne, et les demandeurs ne sont pas devant la Cour, avec la preuve suivie, non interrompue, d'une possession de 30 ans. Ils n'ont donc pas acquis la prescription par une possession de 30 ans.

Les Demandeurs ont tenté de s'appuyer sur ce qu'ils ont prétendu être des actes de possession, mais qui, de fait, n'en sont pas. En fussent-ils, il y a interruption.

2. Les Demandeurs fondent-ils leur action sur un titre translatif de propriété ?

Le premier titre, c'est la patente de 1799, qui, d'après ce qui a été observé plus haut, n'a pu produire le *delivery of seizin*, tout au plus qu'au *Patentee* John Robertson. Le second titre est celui du 15 octobre, 1804, par lequel Mde. Robertson et Wm. Martin, se disant Procureurs de John Robertson, époux de Mde. Robertson, à Patrick Robertson et aux héritiers Alexander Robertson, représentés par Mr. DesRivières, leur tuteur.

Ce titre a-t-il été exécuté par la tradition ? Cela ne paraît aucunement.

Ce n'est pas ici le lieu d'entrer dans une discussion philosophique sur le mérite du nouveau droit comparé à l'ancien, relativement à la question de savoir si la tradition est nécessaire pour imprimer à l'acte de vente ce caractère de perfection qu'il lui faut. Il y a, à n'en pas douter, une différence marquée entre les doctrines qui prévalaient en France, sous l'empire de l'ancien droit, et celles qui ont été reçues et adoptées sous l'influence du nouveau droit. Je renvoie à

Toullier et aux autres auteurs qui ont si sagement approfondi cette question, ceux qui font, comme on le doit, une étude philosophique du droit ; comme juge, je me conforme pour le présent à la jurisprudence française, telle que nous l'avons eue, et telle que nous devons y avoir égard. Elle existait, et c'était la loi, il n'y a pas moyen d'en douter ; à nous de nous y conformer jusqu'à ce que l'on y ait apporté des modifications.

Cela posé, il s'ensuit que le titre de 1804, étant demeuré sans exécution, il ne résulte plus tard, aucun droit, à qui que ce soit, qui réclame en vertu de ce titre. Les Demandeurs se trouvent, par conséquent, sans titre translatif de propriété—et il va sans dire qu'il ne peut plus être question des diverses prescriptions plus courtes que celles de 30 ans, que les Demandeurs invoquent avec titre.

Quant à la prescription de 20 ans, sous le droit anglais, elle est évidemment sans fondement.

40. Supposant maintenant, que les Demandeurs aient eu un titre, le Défendeur en a-t-il un ? et 50. s'il en a un, de qui le tient-il ? et 60. enfin, l'enregistrement qu'il en a fait avant les Demandeurs, lui confirme-t-il ce titre, au préjudice de celui des Demandeurs.

Cette question est délicate en elle même ; elle l'est dans son aperçu moral. D'un côté, si les Demandeurs ont un titre quelconque, il semble injuste, immoral, qu'ils le perdent, par suite de l'enregistrement que ferait un autre individu d'un titre qu'il aurait eu subséquemment, et cela, uniquement parce que les Demandeurs n'auraient pas enregistré le leur. On peut ajouter que les lois d'enregistrement n'ont pas été faites pour dépouiller les individus, mais pour protéger leurs droits, et faire régner l'ordre et la bonne foi, que ces lois doivent être interprétées à la lettre et strictement à l'encontre de ceux qui veulent dépouiller, et libéralement, en faveur

des premiers acquéreurs de bonne foi, qu'ici les Demandeurs ont acquis de bonne foi, qu'ils ont possédé de même, et que le Défendeur n'en peut dire autant, n'ayant été qu'un *squatter*, et ayant profité de l'absence des Demandeurs qui étaient en Angleterre (il n'appert pas que ce fût pour le service de l'état) pour faire, hâtivement et furtivement, enregistrer son titre qu'il s'était de même, fait donner, il n'a jamais pu devenir propriétaire, etc. D'un autre côté, l'on peut dire que si les lois d'enregistrement n'ont pas été faites pour faire perdre aux individus des titres et des droits qu'ils ont aux propriétés, elles doivent protéger ceux qui non-seulement acquièrent, mais font connaître leurs acquisitions, par la publicité de l'enregistrement ; elles doivent empêcher que des grands propriétaires devenant acquéreurs ostensiblement, ou même sérieusement, d'étendues considérables de terres, ne puissent à volonté, plus tard, si les circonstances y donnent lieu, déguiser leurs acquisitions, de manière à se soustraire aux conséquences légales de ces acquisitions ; et qu'après avoir retardé l'établissement et le progrès d'une partie du Pays, ces grands acquéreurs ne puissent, tout à coup, écraser l'homme dont les bras aussi vigoureux que le cœur, ont défriché la forêt et préparé les voies au repos frauduleux du fainéant grand propriétaire. La Législature a sans doute compris que sur ce continent, on ne reconnaît d'autre supériorité que celle du mérite et de l'industrie, et qu'il faut protéger ceux qui ont l'un et l'autre ; que le moyen le plus efficace de faire régner l'ordre et la bonne foi, c'est de tenir chacun à sa place, le propriétaire industriel à la sienne, et le grand propriétaire égoïste et fainéant aussi à la sienne, protection au premier, rigueur envers l'autre ; que s'il est juste d'interpréter strictement les lois d'enregistrement, on ne doit pas perdre de vue que ce principe correctement appliqué est la protection de l'homme utile, et la terreur de celui qui se repose négligemment, et dort à couvert de ses par-chemins et de ses patentes ; et qu'il importe plus à un pays

nouveau que les arbres cèdent à la coignée, que le parchemin à la plume. Il ne faut pas oublier que si les Demandeurs ont un titre, ce titre est sans exécution, et que le Défendeur, lui, en a reçu un, le 2 août 1833, de Madame Robertson, veuve du dit John Robertson, qui, elle et ses filles, patentées en main, avec la qualité, comme le droit, d'héritières de John Robertson, ont vendu au Défendeur qui était publiquement en possession, avait travaillé, défriché, et qui, en achetant, a payé £400, et a depuis continué de travailler ; et qu'en confirmation de ces actes pratiques, il a le 15 août 1833, enregistré son titre auquel il a donné la publicité voulue *strictement* par une loi (10 et 11 Geo. 4, c. 8) faite dans ce but, et dont les dispositions ont été par une autre loi (1 Guil. 4, c. 3) étendues à l'*Ottawa*.

A qui la faute, si le prétendu titre des Demandeurs n'a pas été enregistré, ou ne l'a été que le 5 Novembre, 1834 ? A qui la faute, si les Demandeurs ont négligé de se conformer à la loi, et qu'ils aient souffert d'une absence qui est leur propre fait, dans le cas où ils auraient jamais eu un titre valide, ce qui ne paraît pas ? Le Défendeur doit-il porter cette faute ? Non, sans doute.

Quant à prétendre que le Défendeur connaissait que les Demandeurs étaient propriétaires, c'est vouloir que le Défendeur en sût plus long que qui que ce soit ; qu'il découvrit des droits de propriété et des actes de possession là où nul autre en a connu ; c'est vouloir que qui n'a jamais eu de possession, ait possédé le tout ; c'est vouloir que des *on dits* et des rumeurs tiennent lieu de faits ; c'est vouloir que les Juges croient *Dunning*, qui, lui, était dans la prétendue conspiration contre les Demandeurs, et qui, ensuite, est devenu le dénonciateur de ses co-conspirateurs, le croient, dis-je, de préférence aux faits mêmes, et mettent de côté les considérations puissantes qui ressortent de la connaissance que

chacun doit avoir du cœur humain, et de l'influence que certaines espérances font naître dans l'âme de ceux qui préfèrent l'appui des hommes puissants au maintien des droits du faible mais honnête homme. Ce serait vouloir faire que la Cour présomât la *mauvaise foi* là où il n'y en a aucune de prouvée ; ce serait, en un mot, vouloir que le Défendeur sût ce qui n'est pas et n'a jamais été, c'est-à-dire, que les Demandeurs étaient et sont propriétaires des lots de terre dont il s'agit.

On a beaucoup parlé, lors de l'audition de la cause, de " notice, " et on a accumulé autorités sur autorités ; c'était se donner beaucoup de peine inutile, vu que cette question se réduit tout simplement à celle de la mauvaise foi, qui se règle d'après des principes bien définis dans notre droit, sans qu'il faille s'alambiquer l'esprit pour découvrir en pays étrangers des routes inconnues et tortueuses, tandis que nous avons chez nous un chemin parfaitement connu, qui mène directement au but.

Je me résume :

Il est prouvé que les Demandeurs sont sans titre ; qu'ils ne peuvent invoquer la possession voulue pour leur faire acquérir la prescription de 30 ans, nécessaire à leur action de Revendication ou Pétitoire, qui serait pour eux un titre suffisant ; qu'ils n'ont fait preuve d'aucune autre espèce de possession qui, avec titre et les qualités voulues par la loi, leur conférerait un droit ; que le Défendeur ayant un titre, et l'ayant fait enregistrer, a reçu, non-seulement la confirmation d'un droit à la propriété dont il est question, qu'il possédait dès avant l'enregistrement, mais a aussi, et en outre, obtenu par cet enregistrement qu'ont négligé d'effectuer les Demandeurs, une déchéance de tout droit qu'avaient ou pouvaient avoir les Demandeurs à cette propriété.

Et comme rien n'ent été défini et tranché quant à l'assertion comme à la preuve des propositions que j'ai énoncées, et des principes sur lesquels je me suis fondé, sans établir que cette cause doit être jugée d'après les lois françaises, les lois du pays, et non suivant certaines règles du droit civil de l'Angleterre ; je regarde comme démontré, de manière à n'en pas permettre le doute, que jamais les lois civiles de l'Angleterre n'ont été, quant aux propriétés, introduites en Canada, je parle du Bas Canada ; et que les terres tenues en *franc et commun soccage*, et nommément celles dont il est question en cette cause, doivent être, sauf ce qui tient essentiellement à la tenure, réglées d'après les lois du pays ; n'y ayant aucune autre exception aux règles du droit du pays, que celle qu'y apporte l'article XI de l'Acte de 1774, quant aux lois criminelles, et celles de la sec. 10 de l'Ordonnance Provinciale de 1785, quant aux règles de témoignage dans les affaires commerciales.

D'après toutes ces raisons, j'opine pour le débouté de l'action du Demandeur avec dépens.

Je dois à mon confrère Mr. le Juge Vanfelson, de déclarer distinctement, qu'en dressant les motifs du jugement de la Cour, j'ai eu soin, dans le second considérant, de ne rien dire de l'Acte des Tenures, non plus que dans les autres considérants, attendu qu'il admet le droit du Parlement Impérial de législater en cette matière, et que moi je nie à la Législature Impériale le droit d'intervenir de la sorte, sous le prétexte d'un doute qui n'existait pas même ; la Proclamation de 1763, et l'Acte de Québec n'ont pas introduit en Canada les lois civiles Anglaises, point sur lequel Mr. le Juge Vanfelson et moi sommes d'accord, comme en fait foi le premier considérant du jugement.

“ Considering that the Civil Laws of England have not, either by the Proclamation of Geo. III, bearing date the 1st of

October, 1763, or by the Act of the Imperial Parliament of 1774, chap. 83, commonly called the Quebec Act, ever been introduced into that part of the territories, in North America, ceded by the French King to His Majesty Geo. III, on the 10th February, 1763, which subsequently was known as, and was the Province of Lower Canada, and now is a part of the Province of Canada :—considering that subsequently to the said Proclamation of 1763, and the aforesaid Imperial Act of 1774, chap. 83, there has never been introduced into the aforesaid Province of Lower Canada, now a part of the Province of Canada, any law of Great Britain, or of any part thereof, whereby and in virtue whereof the Plaintiffs in this cause can claim in their favor any adjudication on any of the matters by them set forth in their Declaration :—considering that the said Plaintiffs have altogether failed to establish, according to law, that by a possession of thirty years, or by any possession whatever, such as required by law, they have acquired a right of prescription to the lots of land and immoveable property, the subject matter of this action, against the Defendant :—considering that the Plaintiffs have not legally established that they ever have had or now have a right, either by title (*titre*) or by and in consequence of possession together with title, such as by law can or may be recognized, to the property, or any part thereof, which is the subject matter of this action :—considering that the Plaintiffs have themselves, by the production of the Act of Curatorship, bearing date 7th April 1808, appointing Daniel Sutherland curator to the vacant estate of Patrick Robertson, established that the acts of possession of the said D. Sutherland in respect of the said property, were for and in the interest of the vacant estate aforesaid, or of the creditors of the said vacant estate, and that, therefore, there hath been an interruption in the possession which the Plaintiffs claim and rely upon, and that in consequence they have had no such possession as that which could give them a title

by prescription :—considering that the deed of sale of the 15th October 1804 made by Catherine Christie and William Martin, styling themselves joint attorneys of the said John Robertson, to Patrick Robertson and to the minors of Alex. Robertson, whereby the Plaintiffs claim a right to the property the subject matter of their said action, hath never been executed or followed by *tradition*, and the Plaintiffs have not shewn or established in any way that the said Deed of Sale hath ever conferred upon and to those they pretend to represent, or upon or to themselves, any right to the said property :—considering that the Defendant, by and in virtue of a Deed of Sale of the 2d August, 1833, to him the said Defendant, by Catherine Christie, widow of the said above mentioned John Robertson, in her own name, and her three daughters Catherine, Margaret Mary, and Amelia, the first of whom was married to Philip Anglin, being the heirs at law of their father, the said John Robertson, the said Defendant being then in possession of the said property so sold to him for a valuable consideration, as aforesaid, hath become and since hath been and now is the proprietor thereof :—considering that in conformity to the Provincial Statute 10th & 11th Geo. IV, chap. 8, and in pursuance of the said Statute, the provisions whereof have subsequently, to wit, by the Statute of the Province of Lower Canada of 1 Will. IV. chap. 3, been extended to all such lands and other immoveable property, as at the time of the passing of the said last mentioned Act, were, or thereafter should be held in free and common soccage in the Counties of Ottawa, Beauharnois and Megantic, the said property so sold to the Defendant being and lying in the said County of Ottawa, the said Defendant, on the 15th August, 1833, caused the said Deed of the 2d August, 1833, under which he had acquired the said property, to be registered at the Registry Office for the County of Ottawa aforesaid, established under and by virtue of the said Statutes :—considering that in consequence of the said enre-

gistration of the title of him the Defendant, the Plaintiffs not having then or before the said 15th August, 1833, enregistered or caused to be enregistered the said Deed of the 15th October, 1804, or any older title or deed whereby they claimed or could claim any right to the said property, the subject matter of the present action, he, the said Defendant, hath, to all legal effects, been confirmed in his right by him duly acquired to and in the said property, the subject matter of the present action :—considering that independently of the confirmation of the Defendant's title, as aforesaid, by and in virtue of the aforesaid registration, the said title of the 15th October, 1804, invoked and rested upon by the Plaintiffs, hath become inoperative and of no effect, and utterly void against the said Defendant in this cause, as a conveyance, and cannot and doth not in law in anywise avail the Plaintiffs :—considering lastly, that the Plaintiffs have in nowise proved their allegations so as to be entitled to an adjudication in their favor, and that this action should be dismissed with costs :

Doth dismiss the same with costs.

STUART, H. Attorney for Plaintiffs.

ROSE, of Counsel for Plaintiffs.

DRUMMOND and LORANGER, Attorneys for Defendant.

C. S. CHERRIER, Q. C., and

GRIFFIN, of Counsel for Defendant.

No. 469. { McGINNIS, *Appellant.*
 and
 { HODGE, *Respondent.*

Jugé, que dans le cas de vente d'une maison durant un bail, et de l'abandon de la maison par le locataire sur un ordre par écrit du locateur, sans la mise en demeure par le nouveau propriétaire, ce locataire ne peut recouvrer de dommages de ce locateur, qui n'avait aucun droit de l'expulser.

The Defendant pleaded to this action by setting up that the Plaintiff voluntarily left the premises, without being

legally compelled or required to do so by any person having authority to expel him.

The judgment of the Court below condemned the Defendant to pay £15 damages and costs.

The Court now reversed this judgment. **DAY**, Justice, observing : The equity of the case is with the Plaintiff, but when we look to the law, we are compelled to say, that the Court below was in error. The effect of the sale was not to annul the lease, but merely to put the new proprietor in a position to do so if he thought fit. The Plaintiff's lease was good against all the world except the new proprietor, who might have compelled him to vacate, but only at the end of the term, by giving the usual notice, in the same way as any other proprietor. But in this case the new purchasers took no steps to break the lease. The vendor, who had no right to interfere, went and told the Plaintiff to leave, and thereupon he got alarmed, and went away. This gives him no ground of action against the Defendant. He ought to have known his own rights, and not been misled by the Defendant. If we could have maintained the judgment, we should have been inclined to do so, but it is impossible.

Judgment of the Court below reversed.

MUIR, for Appellant.

BENDER, for Respondent.

SUPERIOR COURT.—MONTREAL.

Before DAY, SMITH and VANFELSON, Justices.

No. 2367 { BOSTON..... *Plaintiff.*
of { vs.
1851. { CLASSON..... *Defendant.*

Held, that under the Imperial Act of the 9th Geo. IV, Chap. 77, (in force in this Province) no general mortgage can be created against lands situate in the Townships, and held in free and common soccage.

Jugé, que sous le Statut Impérial de la 9e Geo. IV, Ch. 77, (en force en cette Province) aucune hypothèque générale ne peut être créée et assise sur les terres situées dans les Townships, et tenues en franc et commun soccage.

Judgment rendered the 20th October, 1851.

This was an hypothecary action, against a *tiers-détenteur*, founded on a general mortgage.

The declaration set out that one Josiah Classon, of Godmanchester, in the district of Montreal, farmer, being indebted to the Plaintiff in the sum of £120, by Notarial Obligation, under date of the 14th March, 1832, "*affecta et hypothéqua tous ses biens présents et futurs*" for the payment of the said sum : that the said obligation was afterwards duly enregistered in the County of Beauharnois, where the said property was situate : that at the time the said Josiah Classon was proprietor and possessor (*détenteur*) of a certain lot of land situate in the Township of Godmanchester, which it described, and which was the land sought to be affected by this action, and which it alleged became mortgaged under the operation of the obligation : that subsequently on the 25th April, 1849, the Plaintiff obtained a judgment against the said Josiah Classon, in the Queen's Bench, the effect of which judgment and the registration thereof, was still further to

mortgage the said real estate : that the Defendant was now *posseur* and *détenteur* of part of the said lot of land firstly described, so mortgaged in favor of the Plaintiff, and prayed as is usual in hypothecary actions.

The Defendant pleaded, that by a deed of sale made before witnesses on the 29th July, 1845, Josiah Classon, referred to in the Plaintiff's declaration, sold and conveyed the lot of land in question to Andrew D. Classon, who afterwards, on the 10th February, 1848, sold and conveyed it to the Defendant : that both these deeds were duly enregistered in the registry office, in the County of Beauharnois, the first on the 31st July, 1845, and the last on the 3rd March, 1849 : and further, the Defendant alleged that, " the said lot of land declared " by the said Plaintiff to be hypothecated to him in the above " cause, and of which the said George F. Classon is proprie- " tor, is situate in the said Township of Godmanchester, " and the same is held and holden in free and common " soccage, and the same has never been hypothecated, and is " not now hypothecated, mortgaged, holden, or bound for the " debts of the said Josiah Classon, as alleged in the Plaintiff's " declaration."

Admissions were given as to the possession and proprietorship of the Defendant, under a good and sufficient title, of the immoveable property in question, held in free and common soccage.

DAY (J.) This is an hypothecary action, founded on a general mortgage, against a *tiers-détenteur*. The land which is situate in Godmanchester, and is held in free and common soccage, has passed through the hands of two parties since the date of the mortgage. Subsequently to the passing of that Obligation, a judgment was obtained against the original debtor, the land having previously thereto passed out of his hands by a sale. It is clear that there was no hypo-

thecation under that judgment, and if there is any hypothecation it must be under the original obligation. The Defendant pleads that the land is situate in the Townships, and that no general mortgage can be created upon lands held there in free and common soccage. The question therefore turns upon the Statute of 1829, whether that Statute is law, it not having received the Royal Assent within the time when, as it is alleged, that Assent could be validly given. This question has been often raised, and (whatever opinions may have existed to the contrary) it has been held by the concurrent decisions of all the Courts, that the Statute is law. I do not feel myself justified in going against these decisions. This being the case, it is provided by the fourth section, that no mortgage shall be created on any lands held in free and common soccage, unless the lands so mortgaged are specially set forth and described. In this case the mortgage is not a special but a general one, and the action therefore must be dismissed.

VANFELSON (J.) dissenting : I have given my opinion in the case of *Stuart vs. Bowman*, (1) that the Statute of 1829 never was law in this country.

SMITH (J.) Whether the Statute of 1829 is law or not, this action cannot be supported. I have always been of opinion that the English law prevails in the Townships, and that lands there cannot be affected by general mortgages. This opinion I gave in *Stuart vs. Bowman* ; but even if I were of opinion that the Statute of 1829 was not in force, still the judgment in this case could not be otherwise than as it is.

The following is the judgment :—"The Court &c., considering that by reason of the *Acte* of obligation in the declaration of the Plaintiff set forth, and by law, no hypothecation or mortgage was created or subsists against the land and

(1) Judgment rendered 26th March, 1851. Now in Appeal.

premises in the said declaration described, inasmuch as the said land is situate in one of the Townships of the Province, and is held by the tenure of free and common soccage, and is not specially set forth and described, in the said *acte* of obligation, as being hypothecated and mortgaged for the payment of the sum of money specified in the said obligation, maintaining the exception by the defendant in this cause pleaded, doth dismiss the action of the Plaintiff, with costs."

OUIMET, for Plaintiff.

STUART, H. for Defendant.

SUPERIOR COURT.—MONTREAL.

Before SMITH, VANFELSON and MONDELET, Justices.

No. 2580 of 1851.	{	WARNER..... <i>Plaintiff</i> , <div style="text-align: center; margin: 0 20px;">vs.</div> MERNAGH..... <i>Defendant</i> .
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Held, that in an action brought by the *Cessionnaire* of the Assignees of a Bankrupt Estate, who has purchased the outstanding debts of the estate, it is necessary to allege in the declaration that the sale was made by the order of the Judge, and that the formalities required by the 67th section of the Bankrupt Act have been complied with.

Jugé, que dans une action par le Cessionnaire des Syndics d'une Faillite, des créances de la Faillite, il est nécessaire d'alléguer dans la déclaration que la vente a eu lieu par ordre du Juge, et que les formalités requises par la 67e section de l'acte des Banqueroutes ont été observées.

Judgment rendered 13th October, 1851.

The declaration alleged the making of a promissory note by the Defendant in favor of one Murphy, on the 24th May, 1847, payable three years after date, for £85 18s. 7d.: that before the note had matured, Murphy became a bankrupt,

and Canfield Dorwin was appointed assignee to his estate ; and that on the 6th September, 1850, " the note was still " remaining unpaid, the said Canfield Dorwin, in his said " capacity, did sell, dispose of, and assign over to the Plaintiff, by a notarial act passed before, &c., and bearing date, " &c., and for the consideration therein named, all and every " the outstanding debts, sums of money, promissory notes " and other assets belonging to and due to the said bankrupt " estate of the said Murphy, a list or schedule whereof is " annexed to the said notarial act, of which act, and the said " schedule thereto attached, an authentic copy is herewith " filed, to form part of these presents ; and the said promissory note being one of the said assets and included in and " forming part of the said list or schedule, was thereby then " and there transferred to the said Plaintiff, who thereby became and now is the true and lawful owner of the said " promissory note."

The Defendant demurred to the declaration, and filed other pleas to which it is unnecessary to allude.

The ground of demurrer was as follows :

" Because by law a transfer or assignment of the outstanding debts and effects of the said Murphy, could only be " made at and after the time appointed for the meeting for the " declaration of a second dividend, and under the direction " of the Judge or Commissioner of Bankrupt, in case " he should be of opinion that unnecessary delay would be " occasioned in collecting such debts or effects ; and because " the said Plaintiff has not in and by his said declaration set " forth or alleged, that such meeting was ever held or called, " or that the said transfer was made under the direction of " such Judge or Commissioner, or in the manner directed and " required by law ; and because it does not appear that Dorwin had the right or was authorized to make this transfer."

Issue was joined on the demurrer and the parties heard.

SMITH, J. dissenting: I am of opinion that this question should have been raised by a special plea, and not by demurrer: besides, the Defendant has no interest. I would dismiss the demurrer.

VANFELSON, J. giving the judgment of the Court: We hold that the want of proper transfer has been properly raised by the *défense au fonds en droit*, which raises an issue as to the sufficiency of the allegations of the declaration. Upon that issue I have read the deed filed, it being declared upon and specially referred to in the Plaintiff's declaration, as forming part of it, and I do not find it mentioned there, that the necessary formalities have been complied with. The Plaintiff ought to have alleged it, and as he has not done so, the action must be dismissed with costs.

MONDELET, J.: I concur in the judgment, but I differ as to the necessity of looking at exhibits on a *défense au fonds en droit*. I look only to the allegations of the declaration. The Plaintiff was bound to have set forth that the formalities required by the 67th section of the Bankrupt Act, 7th Vict. c. 10 had been complied with.

Action dismissed. (1)

DRUMMOND and LORANGER for Plaintiff.

A. and G. ROBERTSON for Defendant.

(1) A like judgment was rendered in *Murray vs. McCready*, No. 594 of 1851, which was an action brought by the *Cessionnaire* of the assignees of D. P. Jones & Co. The Plaintiff had set up in his declaration the Bankruptcy of Jones, appointment of assignees, transfer, &c., but had not alleged that the transfer was made by the authority of the Judge. The Defendant pleaded specially that there was no authority.

SMITH J.: In giving the judgment of the Court, referred to in the above case, said: "I was opposed to the judgment in *Warner vs. Mernagh* on the ground that the Defendant should have pleaded the fact, and not have raised the question by demurrer. In the present case that has been done. It is clear that an observance of the formalities of the 67th section of the Bankrupt Law is requisite to give validity to the transfer, and the action must therefore be dismissed, reserving the Plaintiff's rights."

ABBOTT and MOLSON for Plaintiff.

CARTER and MONDELET, for Defendant.

SUPERIOR COURT.—MONTREAL.

Before DAY, SMITH and MONDELET, Justices.

No. 2420	{	PRICE.....	Plaintiff,
of		NELSON.....	Defendant,
1851.		McKAY.....	Intervening Party.

vs.
and

Held, that a special mortgage is no bar to the exception of *discussion*, and that the *tiers-détenteur* of land, who has been sued by the original vendor, may validly plead that exception.

Also, that the *tiers-détenteur* has no right to claim to hold the property until his improvements and ameliorations have been paid.

Jugé, que l'hypothèque spéciale n'est pas une fin de non-recevoir contre l'exception de *discussion*, et que le *tiers-détenteur* poursuivi par le vendeur originaire, peut lui opposer cette exception de *discussion*.

Aussi, que le *tiers-détenteur* ne peut réclamer le droit de retention jusqu'au paiement de ses impenses et améliorations.

Judgment 20th October, 1851.

This was an hypothecary action, under a special mortgage, created by McKay, the Intervening party, in favor of the Plaintiff. Since the hypothecation, the property had passed into the hands of the Defendant, who was sued as *tiers-détenteur*.

The Defendant, by his exception of *discussion*, set up that McKay, the principal debtor, was possessed of other real property, which he pointed out, and which, he alleged, the Plaintiff was bound to discuss, before she could proceed hypothecarily against him; and tendered *à deniers découverts*, the costs of the discussion.

By another exception, the Defendant claimed that in case he should be condemned to *délaisser* the property, it should be only on receiving back from the Plaintiff the amount

which he had expended in *impenses et améliorations nécessaires et utiles*.

To these two pleas the Plaintiff demurred.

DAY J. The Court is of opinion that the exception of discussion is well founded. As a first impression, it seemed that when there was a special hypothecation, the exception of discussion could not be pleaded, but on reflection we are satisfied that it can. (1) There is another exception, setting up a claim for ameliorations. This, we think, is totally untenable. There is no right of retention on the part of a *tiers-détenteur*. His only right is by opposition, to claim the value of his ameliorations after the property has been sold, and this right is reserved by the judgment.

MONDELET J. My first impression was that a special hypothecation was a bar to the exception of discussion, but a further examination has satisfied me to the contrary.

SMITH J. The general rule is that the giving of a special security does not alter the common law rights of the parties.

The following is the judgment :

The Court having heard the parties on the demurrers of the Plaintiff to the *exception dilatoire* of the Defendant, and the third plea, or second peremptory exception of the Defendant, examined the proceedings, &c. : Considering that the *exception de discussion*, by the Defendant in the said cause pleaded, is well founded in law, doth dismiss the special answer in the nature of a demurrer to the said exception, with costs; and considering that the Defendant is not by law entitled to retain possession of the land and premises in the Plaintiff's declaration and in the said exception described, until the value of his said ameliorations be paid,

(1) Nouveau Den. vbo. Discussion de Biens, Sec. 5, No. 8, p. 532 :—Rep. de Jur. vbo. Discussion, p. 713 :—Trop. Hyp. No. 808, pp. 444-5.

or other the conclusions by him in the said peremptory exception taken, doth dismiss the said peremptory exception with costs, reserving to the Defendant his right to claim the value of his ameliorations, in the said last mentioned exception mentioned, in due course of law.

ROSE and MONK for Plaintiff.

CARTIER and CARTIER for Defendant.

COURT OF QUEEN'S BENCH.—QUEBEC.

Before SIR JAMES STUART, Baronet, Chief Justice, and
 ROLLAND and PANET, Justices.

RUSSEL *et al*, (*reprenant l'instance for Lowndes*),
Defendants, Appellants.
 and
 LEVEY, *Plaintiff, Respondent.*

Held, that in the case of non-execution of a contract of sale of a specific and determined article, destroyed by *vis major*, without any fault of the vendor, and which cannot be replaced, an action can be maintained for the restitution of monies paid in advance of such contract, but cannot be maintained for damages by reason of the non-execution of the same : judgment of the Superior Court, accordingly, confirmed as to the restitution, and reversed as to the damages awarded. (1)

Jugé, que dans le cas de la non-exécution d'un contrat de vente d'un objet spécifique et déterminé, détruit par force majeure, sans la faute du vendeur, et qui ne peut être remplacé, une action peut être maintenue pour la restitution des deniers payés en avance sur le contrat, mais ne peut être maintenue pour dommages résultant de la non-exécution du contrat : jugement de la Cour Supérieure, en conséquence confirmé quant à la restitution, et infirmé quant aux dommages accordés.

Judgment rendered the 29th July, 1852.

This Action had been brought in the Superior Court upon a contract of sale of a quantity of timber, by the buyer against the seller, in damages for non fulfilment of the said contract,

(1) This case, as determined in the Superior Court, is reported at length. *Ante* p. 257.

and for the recovery back of certain sums of money paid in advance by the Plaintiff to the Defendant.

For the particulars of this demand, the pleadings thereto, and the evidence adduced in the cause, we refer to a former report of the case, *ante* p. 257. The Court below (BOWEN, C. J. and MEREDITH, J.) had held that there had been no delivery of the timber sold, and consequently that there was a breach of the contract, and thereupon had condemned the Defendant to pay back to the Plaintiff the amount of his advances, to wit: £488 10s. 10d. and £298 19s. 2d., by way of damages for the non fulfilment of the contract, amounting altogether to £787 10s. The amount of the damages had been established by the value of the timber, when the delivery thereof had been demanded. This judgment had been appealed from by the Defendant.

After an elaborate argument, the Court of Appeals held, with the Superior Court, that there was no delivery of the timber, and condemned the Defendant to pay back to the Plaintiff the advances he had received, but reversed the judgment for the reasons hereinafter stated, in so far as it awarded damages for the non fulfilment of the contract.

Sir JAMES STUART, Baronet, Chief Justice :—The action was brought for the non-execution of a written agreement by which, on the 12th of December, 1844, the Plaintiff bargained with the Defendant to buy of him 14,000 feet of merchantable birch timber, to average sixteen inches, at the rate of eight pence per foot, in full of all charges, excepting six pence for each log, shipping charges, the said timber to be collected from the country north of Quebec, and piled on the wharves of the Defendant in St. Paul Street, during the winter of that year, and to be delivered as required by the said Plaintiff during the then ensuing season of navigation, and payment of the purchase money agreed upon, to be made

from time to time during the said winter, as the timber was piled ready for delivery. The action contains two distinct heads of demand, the first is for a restitution of the monies paid in advance on account of the contract, and the second is a claim for damages for the non-execution of the contract by Lowndes. To this action, the Defendant has pleaded the general issue, and also an exception by which he alleges that the timber in question had been duly delivered to the Plaintiff, and that after such delivery it had been destroyed by fire and lost to the said Plaintiff.

An important distinction must be made between the restitution of the monies paid in advance, and the claim for damages.

On the first point, we are of opinion that there was no legal delivery of the timber, so as to fasten the loss upon the Plaintiff, and that consequently there was no completion of the contract. This is a question of evidence. The sale was of a quantity of timber, to be of a particular quality, averaging a certain size, to be measured in order to ascertain if it averaged the given size ; this timber was to be collected during the winter from a particular portion of the country. The testimony of Herring is conclusive, that the timber was not measured nor received ; that of Jellard is in some respects different, but may be reconciled with that of Herring, inasmuch as Jellard was absent during the winter, and did not receive the whole timber. One Patton had received some, but has not been examined as a witness, Jellard could not swear that the pile alluded to in his evidence contained the timber sold to the Plaintiff, and could not state what this timber averaged.

As to the second point, the claim of damages, the sale was not a sale of birch timber generally, but of a specific determined quality of timber, to be collected north of Quebec, to be piled on a wharf during the winter, measured

and delivered according to contract ; and it having been destroyed by fire it could not be replaced by any other description of timber. Now this timber was destroyed by *vis major*, without any fault or neglect on behalf of the Defendant Lowndes, who was thereby prevented from fulfilling his contract, and in such a case no liability attaches by law upon the party for damages by reason of the non-execution of the contract.

In consequence of this distinction, we confirm the judgment of the Court below for the restitution of the monies paid in advance, and reverse it in relation to the damages awarded by the said Court.

ROLLAND, Justice :—We all agree that there has been no delivery of the timber, but as to the damages, there is more difficulty. To be exempted from damages, for non-execution of a contract, there must have been an absolute impossibility ; now this impossibility is hardly alleged in the exception, which had principally in view the delivery of the timber. However, the Plaintiff has not claimed any special damages, but merely general damages by the loss of the profits ; and finding in the books that in such case and in that of impossibility of the execution of a contract, the matter is left to the discretion of the Judge, and the rules of equity ought to be extended ; I concur with pleasure in this judgment.

Sir JAMES STUART :—We have considered the exception as sufficient to base the judgment we render. The judgment is as follows : (1).

The Court of Queen's Bench, &c., considering that the sale of the birch timber in question in this cause, by the late James John Lowndes to the Respondent, never received its completion ; and that the said James John Lowndes, at the time of the destruction of the said timber by fire, continued to be, and was owner thereof ; considering also that it is

(1) For judgment of the Court below, see *ante* p. 271.

established by the evidence in this cause, that the said James John Lowndes during the winter which followed the making of the agreement declared upon, had collected a larger quantity of birch timber of the kind, quality and description mentioned in the said agreement then necessary for the fulfilment of the said agreement, and had piled the same during the winter on his wharves, as required by the said agreement, of which quantity the timber in question in this cause made part ; and considering also that all the said timber collected and piled as aforesaid, was destroyed by a *vis major*, which prevented the said James John Lowndes from delivering the timber in question in this cause, in pursuance and in execution of the said agreement, without any *laches*, neglect or default on his part ; and considering also, that by reason of the destruction of all the said timber collected and piled as aforesaid, by a *vis major* as aforesaid, it became and was impossible for the said James John Lowndes to deliver the timber in question in this cause, and that the obligation of the said James John Lowndes to deliver the same in execution of the said agreement became and was thereby extinguished ; and considering, therefore, that for the causes mentioned in the said declaration, the Respondent was and is entitled to the restitution of the price by him paid to the said James John Lowndes, for the said last mentioned timber, and nothing more.

It is, by the said Court, now here, adjudged, that the judgment appealed from, namely : the judgment in this cause rendered by the Court below, on the first day of July, one thousand eight hundred and fifty-one, be and the same is hereby reversed, annulled and made void ; and the Court, now here, proceeding to render such judgment in the premises as by the Court below ought to have been rendered, it is, by the said Court, now here, further adjudged that the said Respondent, for the causes set forth in his said decla-

Dans le cas actuel, l'Appelant a allégué sa créance, son jugement contre le curateur, la saisie-arrêt, la comptabilité personnelle du Défendeur comme ayant eu, comme curateur, l'administration des biens d'une succession vacante, et cela doit suffir.

L'on trouve dans Pigeau, une forme d'action absolument semblable à celle-ci. (1)

L'on prétend que la succession vacante devrait aussi être représentée dans cette cause : mais à quoi bon ? Elle n'y a aucun intérêt, puisque la condamnation personnelle d'Oliver tendrait à l'exonérer. Quand à la créance de l'Appelant, elle a été établie dans une précédente action contre le curateur. Je suis vraiment surpris qu'en présence des dispositions de l'Acte de la Législature, la Cour ait cru devoir soulever des difficultés de cette nature.

ROLLAND, Juge : Je ne puis concevoir comment cette action en reddition de compte peut être autre que personnelle. Il est seulement nécessaire dans l'action d'alléguer que le Défendeur a été élu curateur, et que comme tel il est comptable aux créanciers de la succession, puis conclure, &c. Quand un Défendeur est poursuivi en une qualité donnée et non personnellement, c'est que l'action est dirigée ou contre une succession, comme dans le cas du curateur, ou contre un mineur, comme dans le cas du tuteur, ou contre un interdit, &c. Mais la femme commune qui poursuit n'a pas besoin de se donner une qualité quelconque, il n'est pas non plus nécessaire de lui en donner une en la poursuivant comme telle, la communauté qu'elle invoque est un fait, et rien autre chose. C'est seulement quand un tuteur ou un curateur poursuivent dans l'intérêt qu'ils représentent, qu'ils doivent prendre qualité, et cela se conçoit.

Les actions sont de bonne foi, et qui dira qu'ici il résulte aucun désavantage au Défendeur pour sa défense de n'être

(1) 2 Pigeau, pp. 499-500.

pas assigné comme curateur. Sera-t-il dit que lui, n'ayant pas plaidé à l'action, la Cour suppléera ce qu'on appellerait une fin de non-recevoir, à laquelle il a renoncé en ne la plaidant pas, et cela sans intérêt quelconque pour la justice ? Mais l'on dit c'est un officier public. Il est nommé par le juge à la réquisition des créanciers pour gérer les biens affectés à leurs créances ; il est leur mandataire, il leur est comptable aussi bien qu'à ceux des héritiers qui pourront paraître plus tard, voilà tout. (1)

La nomination d'un curateur dans le cas de renonciation, ou d'abstention, ou même d'absence de l'héritier, ne crée autre chose qu'un administrateur de biens vacants.

L'on accorde contre le curateur, comme comptable, la contrainte par corps à défaut de rendre compte ou au cas de malversation. *Tous les comptables* y sont sujets. Ils sont personnellement comptables, et, comme tels, contraignables. Dans le cas où un seul des héritiers est en possession, l'on ne nomme pas un curateur, et pourquoi ? parceque les biens ne sont pas vacants. De dire, par conséquent, que le curateur représente la succession, cela ne me paraît pas exact. Il est bien vrai que les actions contre la succession doivent être dirigées contre lui, car il faut les diriger contre quelqu'un, et il a qualité pour défendre, mais si l'action n'est pas contre *la succession* elle est nécessairement personnelle contre lui, et c'est lui qui devra être condamné.

L'idée émise de faire représenter la succession ou d'avoir une subrogation de la succession, c'est-à-dire d'héritiers qui sont inconnus, me paraît au moins nouvelle, je ne puis la saisir.

Ce que je vois de fâcheux dans cette affaire, c'est qu'un Demandeur qui a un droit d'action, qui ne conclut qu'à ce

(1) Nouveau Denizart vbo. Curateurs à Biens Vacants :—*Ibid*, vbo. Biens Vacants :—2 Pigeau, pp. 479, 500, 510.

qu'il a droit d'obtenir d'après les lois de son pays, soit mis hors de cour par une pure subtilité, qui semblerait être, " que le créancier qui demande un compte ne poursuit pas le Défendeur en qualité de curateur," comme si cela était nécessaire, ou en aucune manière utile ; comme si dans le silence du Défendeur, qui ne dit mot, la Cour craignait de faire un faux pas en condamnant le Défendeur à rendre compte de sa gestion comme curateur. Le Défendeur n'ayant pas défendu à l'action, la Cour a suppléé, ce semble, une fin de non-recevoir qu'il n'invoquait pas, et à laquelle il renonçait s'il avait droit de l'invoquer—un pur défaut de forme—et, sans doute, elle a cru essentiel que le Demandeur recommençât son action en donnant au Défendeur une qualité dans laquelle il devait plaider et se défendre contre les conclusions prises contre lui. Pour rejeter cette demande, évidemment bien fondée, il a fallu la considérer comme mal à propos intentée contre le Défendeur personnellement, et c'est là que cette Cour trouve qu'a été l'erreur.

La qualité de curateur et sa gestion comme tel sont la base de l'action ; mais comme l'action n'est pas dirigée contre la succession, contre laquelle le Demandeur a déjà obtenu une condamnation, mais contre cet administrateur des biens vacants qui est tenu d'en rendre compte, le Demandeur le poursuit en reddition de compte, Que peut-il y avoir de plus raisonnable. Je tiens qu'en général dans aucune action, il est nécessaire de donner ce qu'on appelle une qualité au Défendeur, je veux dire pour l'assigner, à moins que l'action ne soit dirigée contre un corps ou contre un individu que le Défendeur représente ; car alors ce n'est pas lui, le Défendeur, contre lequel l'on demande condamnation. Tels sont les tuteurs des mineurs, les curateurs aux interdits et autres. Mais quand l'action est personnelle, quand c'est le Défendeur même qui doit être condamné, s'il y a lieu, qu'est-il besoin de lui donner une qualité ? Tous les jours l'on voit une

femme mariée prendre ce qu'on appelle la qualité de commune, ou poursuivie en cette qualité. Ce n'est pas là une qualité, c'est son titre de propriété ou la cause de sa comptabilité en certains cas. L'on peut dire la même chose de l'héritier, car c'est toujours *en droit soi* qu'il est Demandeur ou Défendeur.

Nos actions sont de bonne foi ; qu'on allègue dans le libelle de la demande tout ce qui est nécessaire pour fonder la demande, voilà tout ce qu'on peut exiger ; qu'on examine si la demande paraît soutenue par les allégués, voilà toute la forme—sans avoir recours à des subtilités qui n'ont aucune utilité pour but. La loi d'aujourd'hui semble avoir eu en vue de l'empêcher.

Pour la définition de l'action personnelle (*Vide* Merlin) : “ c'est celle par laquelle nous agissons contre celui qui est “ obligé envers nous par contrat ou quasi contrat, délit ou “ quasi délit.” De même un curateur peut être poursuivi personnellement. Il peut aussi poursuivre personnellement sans prendre aucune qualité, lorsqu'il demande quelque chose qui doit lui profiter, et alléguer sa qualité ou sa gestion comme un titre au soutien de sa demande ; tout cela se conçoit. Mais ici l'action est personnelle ; nous le déclarons par notre jugement, et cela ne peut pas être autrement, car ce n'est pas la succession dont il administre les biens qui est poursuivie, mais bien cet administrateur même pour rendre compte de sa gestion.

Sir JAMES STUART, Baronet, Juge-en-Chef. Je diffère de la majorité de la Cour, non pas sur des moyens de forme, mais sur la substance même du droit des parties. En effet, comment le créancier d'une succession vacante peut-il procéder sans la présence du curateur à cette succession, et sans qu'il soit entendu. L'action en reddition de compte est, sans aucun doute, une action personnelle, mais le curateur devait aussi être partie à cette

action. Les conclusions de la demande sont, non seulement que le Défendeur soit condamné à rendre compte, mais que le Demandeur soit payé des deniers de la succession qui se trouveront entre les mains du Défendeur. L'obligation de rendre compte est bien personnelle, mais les conclusions de l'action vont bien au delà. Ce n'est que dans le cas que le Défendeur se refuserait de rendre compte qu'il pourrait être condamné à payer *de bonis propriis*, s'il rend compte, le jugement qui interviendra sera contre la succession : c'est pourquoi, je suis d'avis qu'elle devait être représentée en cette instance.

Le jugement infirmant le jugement de la Cour Supérieure est comme suit :

La Cour, &c. :—Considérant que l'action contre un curateur à une succession vacante, en reddition de compte de sa gestion et administration, ne peut être que personnelle, son obligation, comme comptable, étant personnelle, et qu'il est tenu de rendre compte de sa gestion des biens, sur la demande des créanciers, ou d'aucun d'eux ; et, que dans le cas actuel, la demande est régulièrement intentée, sans qu'il soit nécessaire que la succession y soit autrement représentée, non plus que d'aucune subrogation quelconque, le Demandeur agissant en son propre droit, comme créancier ; et qu'il y a eu erreur dans le jugement, dont est Appel, a infirmé et infirme le dit jugement, savoir : le jugement de la Cour Supérieure rendu à Québec, le vingt-quatre Décembre mil huit cent cinquante, et condamne l'Intimé aux dépens de l'Appel. Et la Cour, rendant le jugement que la dite Cour aurait dû rendre, condamne l'Intimé, Défendeur en Cour Inférieure, à rendre compte au Demandeur de sa gestion et administration des biens de la succession de feu Ch. Gortley, en son vivant voilier, résidant à Québec, comme curateur nommé à cette succession vacante, et ce sous quinze jours de la signification du présent jugement ; pour être procédé ultérieurement comme de droit, soit dans le cas

d'un compte rendu, ou à défaut par le Défendeur de rendre le dit compte, dépens réservés. L'Honorable Juge-en-Chef STUART *dissentiente*.

ANDREWS et CAMPBELL, pour l'Appelant.

CAIRNS, pour l'Intimé.

COUR DU BANC DE LA REINE.—MONTREAL.

Présents Sir JAMES STUART, Baronet, Juge en Chef, et
ROLLAND, PANET et AYLWIN, Juges.

DE CHANTAL *et al.*, (*Défendeurs en Cour Inférieure,*)
Appellants.

et

DE CHANTAL, (*Demanderesse en Cour Inférieure,*)
Intimée.

Jugé, qu'une interdiction et la nomination d'un conseil, obtenus à la requête de l'interdit lui-même, sont de nul effet, quant à un créancier avec lequel l'interdit a contracté; que le contrat est valable, quoique le conseil n'y fut pas partie, si l'interdiction n'a pas été dénoncée au créancier, et si elle n'a pas été inscrite au tableau des interdits.

Jugement de la Cour Inférieure confirmé.

Held, that an interdiction and the appointment of a counsel thereupon, obtained at the instance of the party interdicted are void, in so far as a creditor with whom the party interdicted has contracted is concerned; that such contract is binding, although the counsel was not a party thereto, if the interdiction has not been made known to the creditor, and if such interdiction has not been inscribed upon the register kept for that purpose.

Judgment of the Inferior Court confirmed.

Jugement le 29 Juillet, 1852.

L'exposé suivant de cette cause est tiré des factums produits en icelle.

L'action instituée par l'Intimée, Demanderesse en Cour Inférieure, avait pour objet de faire condamner le Défendeur

Louis De Chantal, l'Appelant, à lui payer la somme de £600 0 0 courant, avec intérêt du 1er Avril, 1848, à elle due en vertu d'une obligation qu'il avait consentie pour valeur reçue, devant M^{res}. Belle et confrère, Notaires, le 31 Mars, 1848, à feu Joseph Beauchamp, son mari, dont elle était bien fondée à exercer les droits.

Les Appelants, c'est-à-dire Louis de Chantal et son épouse, répondirent à cette action au moyen de cinq plaidoyers, dont le premier était intitulé : "Défense au fonds en droit," et dont ils se désistèrent spontanément. Dans le deuxième, ils plaidèrent litispendance quant aux intérêts d'une année, ce qui amena un retrait d'autant. Dans le troisième, ils alléguèrent que longtemps avant la passation de l'obligation ci-dessus mentionnée, l'Appelant, par suite de son grand âge, excédant 83 ans, et de ses infirmités morales et corporelles, était devenu incapable de gérer ses affaires au point qu'il devint nécessaire de l'interdire et de lui faire appointer un conseil, ce qui fut fait le 30 Mars, 1848 ;—Que le dit Appelant était devenu par là incapable de contracter aucun engagement sans l'assistance de son conseil, et qu'ainsi la dite obligation, en la supposant consentie par l'Appelant, ce qu'il niait, était nulle, l'ayant été sans l'assistance de son conseil. Dans le quatrième, ils alléguèrent de nouveau l'incapacité de l'Appelant de contracter aucune obligation à l'époque du 31 Mars, 1848, à raison de l'affaiblissement de ses facultés intellectuelles ; et l'appointement d'un conseil, sans l'assistance duquel fut passée la dite obligation, qui avait pour cause une obligation antérieure datée du 9 Octobre, 1834, dont le dit feu Joseph Beauchamp avait donné quittance ; Que, dès avant le dit jour, 31 Mars, 1848, l'Appelant avait payé tout ce qu'il pouvait devoir à l'Intimée et à feu Joseph Beauchamp, son mari, en vertu de cette dernière obligation et de celle de 1834, dont le dit Beauchamp avait, par divers reçus sous seing privé, reconnu la paie-

ment ; Que l'Appelant n'avait jamais été partie et n'avait jamais acquiescé à la dite quittance ; Que le dit feu Beauchamp avait employé le dol et la fraude. Dans le cinquième plaidoyer, la défense en fait fut invoquée.

L'Intimée, dans ses réponses aux divers plaidoyers ci-dessus, maintenait que l'interdiction prétendue de l'Appelant n'était qu'une interdiction volontaire, dépourvue des formalités légales qui pouvaient la faire militer contre elle, qu'elle n'avait été imaginée que pour frauder feu son mari, et elle expliquait comme suit les circonstances qui ont donné lieu à la dite obligation du 31 Mars, 1848.

Le 9 Octobre, 1834, l'Appelant, père de l'Intimé, lui consentit une obligation au montant de la somme de £540 0 0 courant, avec intérêt, étant pour partie de ses droits dans la succession de sa mère décédée.

Le 31 Mars, 1848, l'Appelant et le dit feu Joseph Beauchamp réglèrent les intérêts de cette première obligation pour laquelle ce dernier lui donna quittance le même jour, en considération de l'obligation nouvelle que lui consentit le dit Appelant, et qui fait la base de cette action.

L'Appelant fit de grands efforts pour établir sa folie à l'époque de l'obligation de 1848, mais sans succès. Il résulte évidemment du témoignage qu'il feignait la folie.

Une prétendue quittance, sous seing privé, apposée au bas d'une expédition de l'obligation de 1834, nécessita l'examen d'un grand nombre de témoins, dont la plus grande partie établirent que la signature prétendue de Joseph Beauchamp, au bas de la dite expédition, était fausse.

L'Intimée s'est plaint par motion à la Cour Inférieure, que cette prétendue quittance n'avait été produite qu'à l'enquête, au lieu de l'être avec le plaidoyer dans lequel elle n'était pas même mentionnée. Elle fit même motion qu'elle fut rejetée, mais sans succès, la Cour ayant été divisée d'opi-

nion sur la question, et la Demanderesse s'étant désistée de sa motion pour éviter les longueurs de cette procédure incidente. Malgré la position difficile faite à l'Intimée par l'irrégularité de cette procédure, le résultat de l'enquête lui fut tout à fait favorable.

La mauvaise foi de l'Appelant perce dans tous ses procédés en cette cause.

Après avoir négligé depuis 1834 de payer à l'Intimée le montant de l'obligation portant cette dernière date, il se fait interdire volontairement le 30 Mars, 1848, et le lendemain se fait donner par le dit feu Joseph Beauchamp, qui ignorait son interdiction, une quittance de cette première obligation, moyennant la seconde obligation du 31 Mars, 1848, qu'il consent sans l'assistance de son conseil, et qu'il croit entièrement nulle, à raison de cette circonstance.

Il s'efforce de prouver par témoins la quittance sous seing privé de l'obligation de 1834, tandis que la quittance authentique d'icelle se trouve au record sous la date du même jour, 31 Mars, 1848. Il est vrai qu'il nie dans ses plaidoyers avoir jamais eu connaissance de cette dernière, mais plusieurs témoins ont établi qu'aussitôt après l'avoir reçu du Notaire, le lendemain du jour où elle fut consentie, il l'avait porté lui-même au bureau d'enregistrement. Ses réponses supplémentaires aux interrogatoires sur Faits et Articles, au sujet du paiement de l'obligation de 1834, détruisent son allégué de paiement à l'époque de la prétendue quittance sous seing privé.

L'étudiant qui a copié l'expédition, au bas de laquelle se trouve cette prétendue quittance sous seing privé, dit que, n'étant pas, à la date de cette quittance, étudiant chez le notaire qui a signé cette expédition, et n'ayant jamais copié pour lui que pendant la durée de son brevêt, cette quittance ne peut pas y avoir été écrite à la date qu'elle porte.

L'Intimée soutenait que la prétendue interdiction de l'Appelant n'en est pas une : qu'elle n'est revêtue d'aucune formalité légale. Le nom de l'Interdit ne fut jamais mis au tableau des interdits, ainsi que le porte l'ordonnance du juge qui a prononcé cette interdiction, elle n'a jamais été signifiée à aucun Notaire, non plus qu'à l'Intimée ou à feu son époux.

Le jugement de la Cour Inférieure sous ces circonstances a déclaré l'Intimée bien fondée en droit et en fait et a maintenu son action. C'est de ce jugement qu'est le présent Appel.

SIR JAMES STUART, Juge-en-Chef :—Dans cette cause il est question de la validité d'une interdiction pour cause d'insanité, et, par suite, de la validité d'une obligation consentie subséquemment par l'interdit.

L'intimée, demanderesse en Cour Inférieure, prétend que cette interdiction est nulle et a été obtenue par fraude. Anticipant la défense elle a allégué dans son action la nullité de cette interdiction, tandis qu'elle aurait dû attendre qu'on la lui opposa, pour en demander la nullité. L'on avait d'abord opposé à cette action une défense en droit, qui eut dû réussir si on ne l'eut retirée. Au mérite, l'Appelant, le Défendeur en Cour Inférieure, a plaidé qu'il était interdit lors de la passation de l'obligation, qu'elle lui avait été surprise par fraude et sans bonne et valable considération, qu'il était alors frappé d'aliénation mentale et incapable de s'obliger, enfin que l'obligation avait été acquittée.

Nous sommes d'avis que l'interdiction est nulle et frauduleuse. Elle a été accordée sur la demande du Défendeur, auquel on donne un conseil, et que l'on interdit en même temps. La nomination d'un conseil est essentiellement différente de la nomination d'un curateur à un interdit : le premier n'est donné que pour aviser et assister une personne faible d'esprit ; le second a l'entière administration des biens de l'interdit. D'ailleurs, avis

aurait dû être donné de cette interdiction. La fraude perce de tout côté dans cette procédure. Quant au défaut de considération et à la prétendue surprise, il n'en est rien. La preuve établit qu'une obligation antérieure avait été acquittée, et c'était là une considération suffisante. L'aliénation mentale, alléguée de la part du Défendeur, était feinte et simulée, dans la vue de frauder la Demanderesse.

La quittance sous seing privé, produite pour prouver le paiement de l'obligation, est une autre tentative de fraude, car il est évident que cette quittance a trait à une obligation antérieure, dont j'ai parlé plus haut. En conséquence, nous confirmons le jugement.

ROLLAND, Juge : Je concours dans le jugement, mais je ne suis pas d'avis que la défense en droit était fondée ; la Demanderesse sachant que le Défendeur avait un conseil a dû le mettre en cause de suite pour demander la nullité de l'interdiction. Je n'hésite pas à dire que toute la conduite du Défendeur en cette cause est entachée de fraude.

Le jugement de la Cour Inférieure est comme suit :

“ The Court &c., doth reject the several motions of the said
 “ Defendants, of the said first of December last, and considering
 “ that the said Defendants have failed to establish, that at the
 “ time of the passing of the obligation of the thirty-first of March,
 “ one thousand eight hundred and forty-eight, he, the said De-
 “ fendant, Louis De Chantal, was legally interdicted, or that
 “ there existed any legal incapacity in him at the time of the
 “ execution of the said *acte* to bar or prevent him from entering
 “ into the same, and considering further, that the pretended inca-
 “ pacity arising from the nomination of a Counsel to aid and
 “ assist him the said Defendant, in the execution of any acts, or
 “ deeds, or obligations tending to the alienation of the immoveable
 “ property of him the said Defendant, and without whose pre-
 “ sence and consent, it is contended that the said acts, deeds or

“ obligations are by law illegal, null and void, as set out in the
 “ said plea or exception, secondly pleaded by the said Defendants,
 “ cannot by law have the legal effect of a Judgment of interdiction,
 “ inasmuch as the simple nomination of a Counsel, without the same
 “ being publicly entered and inscribed on the *Tableau des Inter-*
 “ *dits*, and without notice to the party contracting with the said
 “ *Interdit*, cannot by law operate as a legal bar or impediment to
 “ prevent the said *Interdit* from entering into and contracting
 “ any obligation ; and considering that at the time of the execu-
 “ tion of the said obligation of the said thirty-first March, one
 “ thousand eight hundred and forty-eight, the nomination of a
 “ Counsel to the said Defendant, Louis De Chantal, was wholly
 “ unknown to the said Plaintiff, and had not been *affichée* nor
 “ inscribed on the said *Tableau des Interdits*, as by the order of
 “ the Judge and by law it ought to have been, doth dismiss the
 “ said exception, thereby secondly pleaded by the said Defen-
 “ dants, with costs ; and further, considering that the said
 “ Defendants have wholly failed to establish, by legal evidence,
 “ any of the matters pleaded in defence to this action by the
 “ peremptory exception by them thirdly pleaded to the said
 “ action, doth also overrule and dismiss the same with costs ;
 “ and considering that the said Plaintiff hath established by legal
 “ evidence the *indebtedness of the said Defendants* by the obli-
 “ gation of the said thirty-first day of March, one thousand eight
 “ hundred and forty-eight, and that by a *Retraxit* filed by the
 “ said Plaintiff in her answer to the plea of the said Defendants
 “ secondly pleaded, she, the said Plaintiff, hath reduced her
 “ demand, in respect of the amount of thirty-six pounds, being the
 “ amount of interest referred to in the plea or exception firstly
 “ pleaded by the said Defendants, doth order, adjudge and con-
 “ demn the said Louis De Chantal to pay to the said Plaintiff the
 “ sum of six hundred pounds, with interest from the first of April,
 “ one thousand eight hundred and forty-nine, until actual payment
 “ and costs of suit *distracts* in favor of N. Dumas, Esquire, At-
 “ torney for the Plaintiff, the said sum of six hundred pounds,

“ being the amount of the said obligation made by the said
 “ Defendant, Louis De Chantal, to and in favor of the late
 “ J  seph Beauchamp, passed before Maitre Belle and colleague,
 “ Notaries Public, on the said thirty-first day of March, one
 “ thousand eight hundred and forty-eight.”

Le jugement de la Cour d'Appel est comme suit :

The Court, &c., considering that the material allegations of the Respondent, in her declaration in this cause, in the Court below, have been proved and established ; and considering also that the Pleas and Defences of the Appellant in this cause, in the Court below, have not been proved or established, and are without foundation in law or in fact ; it is by the Court now here adjudged that the judgment appealed from, namely : the judgment in this cause rendered by the Court below, on the 7th day of January, 1852, be, and the same is hereby in all things affirmed ; with costs to the Respondent, Denise H. De Chantal, against the Appellant, Louis De Chantal.

BURROUGHS, pour l'Appellant.

DUMAS et CHERRIER, pour l'Intim  e.

SUPERIOR COURT.—QUEBEC.

Present DUVAL and MEREDITH, Justices.

No. 332 { SOOTT,..... *Plaintiff*.
of { vs.
1852. { HESCROFT,..... *Defendant*.

Where goods, deliverable to "order or assigns," are landed from a vessel after the expiration of the delay allowed by law to the importer to land the same, the Captain is not liable for any damages that may accrue thereto, after they have been placed upon the wharf.

Lorsque des marchandises qui doivent être livrées "à ordre" sont déchargées d'un vaisseau à l'expiration du délai accordé par la loi à l'importateur pour les faire décharger, le Maître du vaisseau n'est pas responsable des dommages qu'elles peuvent éprouver après qu'elles ont été déposées sur le quai.

Judgment 19th July, 1852.

The Plaintiff's declaration alleged that Morewood, Brothers & Co., of Liverpool, (who also traded at New York,) shipped 96 bundles of galvanized metal in good order, of the value of £239, on board the ship "Glenswilly," of which the Defendant was Master, on the 27th February, 1851, at Liverpool, and that the Defendant, as Master, undertook to convey the same thence to Quebec, to be delivered there, unto "order, or their assigns." That the shippers subsequently endorsed the bill of lading signed by the Defendant, and delivered it to the Plaintiff. That the Defendant, upon the arrival of the ship at Quebec, landed the said metal upon one of the wharves, without notice to the Plaintiff, or without advertising for a consignee, according to usage and custom at the port of Quebec, and that while on the wharf, the metal was damaged by rain to the amount of £250 which the Plaintiff claimed from the Defendant.

The Defendant pleaded a *défense au fonds en fait*, expressly denying the truth of each and every allegation of fact set forth in the declaration.

The evidence established that the bill of lading was to "order, or their assigns," and had been endorsed to the Plaintiff without any knowledge thereof having been given to the Defendant. The "Glenswilly" arrived at Quebec on the 9th May, 1851, and a Custom House Officer was then placed on board, who remained until the whole of the cargo had been discharged. The consignee being unknown to the Defendant, he caused enquiries to be made among parties who were likely to be importers of galvanized metal, in order to discover the owner; among others, the Plaintiff was called upon, and informed that 96 bundles of galvanized metal were on board from Liverpool, and he was asked if he were the consignee, he replied that he was expecting that quantity of metal from Liverpool, but that not having received any advice of the shipment on board the "Glenswilly," he could not take it. An advertisement for a consignee had been posted up in the Exchange. After the lapse of 12 days, an order was procured from the Collector of the Customs, addressed to the Custom House Officer on board, directing him to land the metal and convey it to the Customs' Warehouse. The metal was landed on the 21st May, and placed on a wharf, where it remained until the 26th, when the Plaintiff claimed it, having received the day before (Sunday) a letter from the New York firm inclosing the bill of lading, and stating that in consequence of an error on the part of the Liverpool shippers, the bill had been sent to a wrong party. During the interval between the 21st and 26th the metal had been damaged by rain to the amount of £87. The Custom House Officer who had been on board, deposed that the metal could not have been landed without his permission, and that he would have had it sent

to the Warehouse, but was prevented by press of business ; that it was then under the control and responsibility of the Custom House authorities, and that while the metal was on the wharf, a watchman from the Custom House had charge of it.

HOLT, for Plaintiff :—The Defendant was bound to advertise in the newspapers for a consignee, and in default of discovering one, it was his duty to place the metal in a Warehouse where it would have been protected from damage. The Plaintiff did not know the metal was his until five days after it had been landed, and therefore could not claim it.

POPE, for Defendant : It is not proved that the general custom at Quebec is to advertise in the newspapers. A special notice was nevertheless given to the Plaintiff. The whole question must be decided by the interpretation to be given to the Provincial Statute regulating the duties of Customs (1). The 12th Sec. enacts, "That every importer of any goods by sea, or from any place without this Province, shall, within five days after the arrival of the importing vessel, make due entry inwards of such goods and land the sameand such person shall at the same time pay down all duties upon all goods entered inwardsand in default of such entry and landing..... or payment of duty, IT SHALL BE LAWFUL FOR THE OFFICERS OF CUSTOMS TO CONVEY SUCH GOODS TO THE CUSTOMS WAREHOUSE ; and if such goods be not duly entered and the duties due thereon paid, within three months from the date of such warehousing, TOGETHER WITH ALL CHARGES OF REMOVAL and warehouse rent, the same shall be sold by public auctionand the proceeds thereof shall be applied, FIRST, to the payment of duties and charges,

(1) 10 & 11 Vic. Cap. 31.

"and the overplus, if any, after discharging the vessels lien, "shall be paid to the owner of the goods." The metal could not be landed from the vessel until the entry had been made, and if it were landed without such entry, it would have been forfeited, (1) in which case a different action should have been brought, but if the metal were landed after the receipt of a proper order, then it was no longer in the custody of the Defendant. The Customs had a lien on the metal preferable to that of the Defendant for freight, (2) and therefore it was lawful for them to take possession in default of entry or payment of the duties ; and consequently, it was lawful for the Defendant to give them possession. As the Customs were by law directed to convey the goods to the Warehouse in default of entry or payment by the importer within the five days, and as neither entry nor payment had been made within 12 days, when the metal was landed, it follows that when it was so landed, it was entirely in the custody of the Custom House, whose duty it was to place it in the Warehouse, and that if it was damaged afterwards, the Plaintiff might have a recourse against other parties, but not against the Defendant, who had been divested of the custody and possession of the goods in pursuance of the Statute.

Several other points were raised at the argument by the Defendant, but as the judgment is wholly based on the Statute above referred to, it is needless to report them.

The Court, &c : Considering that the said Plaintiff did not, within five days after the arrival of the ship "Glenswilly," in which the ninety-six bundles of galvanized metal mentioned in the Plaintiff's declaration, were imported, cause the said ninety-six bundles of galvanized metal to be entered inwards as by law he was bound to do ; and considering

(1) Ib. Sec. 8.

(2) Ib. Sec. 12.

that by reason thereof, and of the Defendant not having received any information from the shippers of the said ninety-six bundles of galvanized metal, or from the Plaintiff, being the person to whom the said ninety-six bundles of galvanized metal were to be delivered by the Defendant, he, the said Defendant, was justified in allowing the Officers of Her Majesty's Customs to take possession of the said ninety-six bundles of galvanized metal ; and considering also that it is established by the evidence adduced in this cause, that at the time the said ninety-six bundles of galvanized metal sustained the damage for which the said Plaintiff now asks to make the Defendant liable, the said ninety-six bundles of galvanized metal were in the custody and possession of the Officers of Her Majesty's Customs, in consequence of the neglect aforesaid on the part of the Plaintiff, and had ceased to be in the possession of the Defendant, the Court doth dismiss this action, with costs to the Defendant.

HOLT & IRVINE, for Plaintiffs.

POPE, for Defendant.

COUR SUPERIEURE.—QUÉBEC.

Présents BOWEN, Juge-en-Chef, DUVAL et MEREDITH, Juges.

No. 853 { ANDERSON *et al.* *Demandeurs.*
 de { vs.
 1852. { DESSAULES *et al.* *Défendeurs.*

Jugé, que sur une demande pour arrérages d'intérêts, il doit être adjugé des intérêts moratoires.

Held, that in an action for arrears of interests, interest upon the sum demanded may be awarded by the judgment.

Jugement le 5 Octobre, 1852.

Cette action était portée pour la somme de £1050, intérêts dus et échus sur un prêt de £7000, avec intérêt sur la dite somme de £1050 à compter du jour de la demande.

Les Demandeurs procédèrent *ex parte*. La seule question qui s'éleva fut de savoir si la demande étant pour des intérêts, le jugement à rendre devait porter intérêt.

DUVAL, Juge : La majorité de la cour est d'opinion d'accorder des intérêts. L'opinion contraire pouvait autrefois exister en France, où tout prêt d'argent, sauf la rente constituée, était réputé usuraire et était une question réglée par le droit canonique ; mais dans ce pays, depuis la passation de l'Acte Provincial 17 Geo. 3, c. 3, qui règle le taux des intérêts que l'on peut exiger sur les prêts d'argent, cette question ne souffre plus aucun doute.

MEREDITH, Juge, concourt dans le jugement, et s'exprime comme suit :—

This action is brought for the recovery of £1050 currency, being arrears of interest due by the Defendants to the Plaintiffs, and a question of some importance presents itself, namely : are the Plaintiffs entitled to interest from the service of process, upon the sum thus due to them as arrears of interest.

According to the laws of France as established in Canada, it is clear that such interest upon interest could not have been allowed ; and it is equally clear that according to the same laws the claim for the £1050 currency, must also have been rejected ; for in that part of France known as *la France coutumière*, the loan of money at interest, was prohibited under severe penalties, not only by the (1) Canon law, but also by the Civil law ; and in no tribunal in France, was this prohibition more rigidly enforced, than in the *Parlement de Paris* (2)

In this respect our law has been entirely changed by the 17 Geo. III, Chap. 3, which expressly sanctions the loan of

(1) Troplong du Pret, préface pp. 111-113-115 :—*Ibid* No. 305 :—17 Duranton, Nos. 593-608.

(2) Troplong du Pret, préface pp. 151-159-163.

money at interest, and declares that “six *per centum per annum*, shall be allowed and recovered in all cases where “it is the agreement of the parties that interest shall be paid.”

The French Courts allowed interest upon seigniorial arrears, upon arrears of ground rents, and upon arrears of interest produced by operation of law, (1) *intérêts dus de plein droit*, because such arrears might be treated as a capital and be made to produce interest. Now, since the passing of the 17 Geo. III, I know of nothing to prevent arrears of conventional interest from being made to form a capital and to produce interest. It therefore seems that there is now the same reason for allowing interest upon arrears of conventional interest, that there is for allowing interest upon arrears of interest produced by mere operation of law, and *ubi eadem ratio, ibi idem jus*.

It may be further observed that it is a general rule of our law, (2) that a creditor suing for a debt, is entitled to interest from the time he places his debtor *in morâ*, by the service of process upon him, and I know of no ground under the law as it now stands, which would justify us in making cases such as the present an exception to that general rule, under the old law of France, I speak of course of *la France coutumière*, the question could not have arisen, because as I have already observed, the loan of money at interest was prohibited.

It is true, that cases supposed to be analogous to the present, namely, actions for arrears of constituted rents, (3) were by the *Parlement de Paris*, in numerous cases, treated as forming an exception to the general rule to which I have

(1) 9 Guyot's Rep. pp. 467-469 :—15 Merlin Rep. p. 436, vbo. Interest, sect. IV, No. 6.

(2) 9 Guyot's Rep. p. 466 col. 2 :—Pothier, Oblig. 170.

(3) 15 Merlin Rep. p. 436 :—*Ibid* vbo. Rente Constituée 11 No. 5.

adverted, because such arrears were held to come within the rule *usura usurarum exigi non possunt*, (1) which rule was regarded as binding, and was zealously enforced by the *Parlement de Paris*. But if, as I contend, that rule has no longer the force of law here, and that arrears of interest of any kind, may be turned into a capital, so as to produce interest, then the ground upon which some of the French Courts refused to allow interest, upon the arrears of a constituted rent, could not be urged here ; and if that ground cannot be urged, I know of no other which would justify us in excluding actions for arrears of conventional interest, from the operation of the general rule, according to which a creditor suing for a debt is entitled to interest from the service of process.

Under the modern law of France the question is not susceptible of difficulty. The article 1905 of the Code Civil expressly permits the stipulation of interest upon loans of money, merchandize or other moveables, and the article 1154 determines in what cases, interest on interest may be charged and allowed.

As to the reasonableness and justice of the doctrine adopted by the majority of the Court, I think there cannot be any doubt. A Plaintiff to whom interest is awarded for the time that he has been deprived of the use of his money, in consequence of delays incident to legal proceedings, which the conduct of the debtor has rendered necessary, receives but a bare compensation for the loss to which he has been unjustly subjected : and to allow a debtor to postpone the payment of what he owes, in violation of his own contract, and against the will of his creditors, without paying even ordinary interest for the delay thus obtained, would be simply to hold out a premium for dishonest litigation.

(1) 28 Merlin Rep. p. 239.

For instance, in the present case, the debtors by moving for an Appeal to the Privy Council, and putting in the necessary security, might obtain about 18 months' delay ; and if they had not to pay interest for the delay thus obtained, they would by a manœuvre practised as it were in the presence of the Court, make a gain of nearly £100, at the expense of the Plaintiffs, and this without the Court being able to afford the Plaintiffs any redress whatever. The maxim, that there is no wrong without a remedy, requires that a debtor unjustly retaining money in his hands, should pay interest for the money so retained.

I will merely add that I have been informed by one of the Judges of the Superior Court at Montreal, that that Court has allowed interest from service of process upon sums of money due as conventional interest.

BOWEN, Juge-en-Chef, diffère. Il était d'opinion que la somme demandée étant pour arrérages d'intérêts, le jugement n'en devait pas porter.

Jugement en faveur des Demandeurs.

ANDERSON, pour les Demandeurs.

IN THE QUEEN'S BENCH.—QUEBEC.

APPEAL SIDE.

Before Sir JAMES STUART, C. J., and ROLLAND. PANET and
AYLWIN, Justices.

1852. { WEYMESS, *et al.*, (*Plaintiffs*), *Appellants*.
 and
 { COOK, (*Defendant*), *Respondent*.

<p>Held, that in an action <i>en bornage</i>, if the Defendant denies the Plaintiff's right of action, he must be condemned to pay costs.</p>	<p>Jugé, que si dans une action de bornage, le Défendeur nie au Demandeur son droit d'action, il doit être condamné aux dépens</p>
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Judgment the 29th July, 1852.

On the sixth day of December, 1850, the Appellants instituted an action *en bornage* against the said Respondent, returnable in the Circuit Court, for the Quebec Circuit, to cause metes and bounds to be run and drawn between their respective properties, in due course of law.

To this action the Respondent put in two pleas : 1st, the general issue, and 2nd, a perpetual peremptory exception, by which it was alleged that he, the said Respondent, had always been ready and willing to cause the lines and boundaries between their said respective lots of ground or emplacements to be run by a surveyor, according to law, and was still ready and willing so to do ; and that he never was requested by the said Appellants, or either of them, to have the said lines run, nor had the said Respondent ever refused so to do. The Appellants joined issue upon both these pleas. No evidence was adduced by either party. By a consent motion made in the said cause, on the twenty-fourth day of April, 1851, George Austin, a land surveyor, was appointed by the Court to draw the line of division separating the respective properties of the said parties, according to their title deeds, and on the seventh day of May, 1851, he filed his report, with a plan, shewing the lines of division

between the parties, and how the Respondent encroached on the land of the said Appellants, to the distance and measurement of four inches in front, and gradually widening to thirteen inches in the rear, containing about sixty-four superficial French feet. On the twenty-seventh day of December last, (the Appellants having previously moved for the homologation of the surveyor's report, and inscribed the cause for final hearing,) the Circuit Court pronounced the following judgment :—(Present : POWER, Justice.)

“ The Court having heard the parties by their respective
 “ counsel, upon the motion of the Plaintiffs of the twenty-
 “ fourth instant, doth grant the said motion, and in conse-
 “ quence homologates the report of George Austin, Esquire,
 “ land surveyor, filed in this cause, the seventh day of May
 “ last, to be executed between the parties ; and the Court
 “ condemns each party to pay one-half of the costs of survey,
 “ and condemns the Plaintiffs to pay the costs of the suit.”

From this judgment an appeal was instituted, and the cause having been brought before the Superior Court at Quebec, was heard before Bowen, Chief Justice, and Bacquet and Duval, Justices, and the following judgment rendered :—

“ The Court having seen and examined the proceedings
 “ had and of record in this cause, and having heard the parties
 “ by their Counsel respectively ; considering that the Plain-
 “ tiffs have not proved the material allegations contained in
 “ their declaration, and in particular that previously to the
 “ institution of this action, the Plaintiffs had demanded of
 “ the Defendant to cause metes and bounds to be placed to
 “ divide the property of them the said Plaintiffs, from the
 “ adjoining property of the Defendant ; and considering fur-
 “ ther the *consent* given by the Defendant, on the return of
 “ the writ *ad respondendum* issued in this cause, that metes
 “ and bounds be placed to divide the said property. And

“ that in the judgment from which the present appeal hath
 “ been instituted, to wit : the judgment rendered in this
 “ cause, in the Circuit Court, Quebec Circuit, on the 27th
 “ day of December, 1851, there is no error. It is by the
 “ Court now here adjudged that the said judgment be, and
 “ the same is hereby in all things affirmed, with costs to the
 “ said Patrick Cook, the Respondent, against the said Ann
 “ Weymess, wife of Thomas Kinchelo, and the said Thomas
 “ Kinchelo, the Appellants.”

This judgment was rendered by the majority of the Court,
 viz: Bacquet and Duval, Justices ; Bowen Chief Justice
 dissenting, for the following reasons set forth in the said
 judgment, as follows :—

“ Because the judgment rendered in the Court below hath
 “ been rendered in an action *en bornage*, the Plaintiffs’ land
 “ having been encroached upon by the Defendant, to the
 “ extent of sixty-four superficial feet, and the Plaintiffs
 “ having been condemned to pay the costs of the action, on
 “ the ground that the Plaintiffs had not proved that the Defen-
 “ dant had refused to proceed to a *bornage* ; whereas on
 “ receipt of the summons, the Defendant, to avoid costs,
 “ ought by protest, to have notified the Plaintiffs of his
 “ supposed readiness to proceed to such *bornage*, and thereby
 “ prevent the return of the action into Court, instead of
 “ which by his *defense au fonds en fait*, he denies the
 “ Plaintiffs’ right, and demands the dismissal of the
 “ action, as he also does by the conclusions of his perpetual
 “ exception. Wherefore his Honor the Chief Justice is of
 “ opinion that the Plaintiffs ought to have the whole costs
 “ of suit, or that under the most favorable view of the case
 “ of the Defendant, the costs should have been equally divi-
 “ ded between them, and the Appellants should have the
 “ costs in appeal.”

It is from the above judgment that the appeal had been brought.

From the foregoing statement it is apparent that the complaint of the Appellants was limited simply to that portion of the judgment of the Circuit Court, confirmed by the Court below, which condemned them to the costs of suit.

On behalf of the Appellants it was said that the Circuit Court, in condemning the Appellants to the costs of the action, based its judgment on the assumption of the obligation in law of the Appellants to put the Respondent *en demeure*, prior to the institution of their action *en bornage*, and had overlooked the two pleas put in by the Respondent, in one of which he put in issue the right of action of the Appellants, and by both prayed for the dismissal of the Appellants' action.

The French law, in force in this county, gives the action *en bornage* to neighbours, without making it necessary that an extra judicial demand should be made, and the only plea that could defeat this action would be, subsisting boundaries still visible (1).

The modern law of France is analagous to the old on this subject.

(1) Dictionnaire de Droit (Ferrière) Vbo. Action de bornage, vol 1. page 37. 1 col.

Idem, Vbo. Bornes. vol. 1, page 196, 1 col.

2 Guyot, Répertoire de Jurisp, pp. 451, 452, Vbo. Bornage, Borne.

2 Pothier Cont. de Soc. No. 231, p. 620.

" Cette action est aussi du nombre de celles qu'on appelle *judicia duplicia*, dans lesquelles chacune des parties, tant celle qui a donné la demande que celle contre qui elle est donnée, est tout à la fois demandeur et défendeur ; L. 10, ff fin. reg. Car par cette action chacune des parties, celle qui est assignée aussi bien que celle qui a assigné, réclame chacune l'une contre l'autre ce qui par le bornage sera déterminé faire partie de l'héritage."

2 Guyot Rép. Jur. Vbo. Bornage, p. 452.

" La même action est encore du nombre de celles qu'on appelle doubles ou réciproques, et dans lesquelles chacun des adversaires, tant celui qui a formé la demande que celui contre qui elle est formée, sont tout à la fois demandeurs et défendeurs. En effet chacune des parties réclame contre l'autre ce qui par le bornage sera prouvé faire partie de son héritage."

1 Fournel Voisinage, pp. 237, 238, 239, 240.

Viewing this case most favorably for the Respondent, all he could possibly have expected was that the costs of suit in the Circuit Court would have been divided between the parties, and, from the preceding observations, supported by the authorities referred to, it is difficult to understand how any other adjudication with respect to costs, could have been arrived at, in an action *en bornage* where the *bornage* is demanded by the parties themselves, and ordered by the Court.

That there were ample and substantial reasons in the case, from the pleadings set up by the Respondent, and from the report of the surveyor named by the parties themselves, to have justified the Circuit Court in condemning the Respondent to all the costs of suit.

1. The Respondent by his *défense au fonds en fait*, has put in issue every material fact alleged by the Appellants, their right of property, contiguity, &c., and by his peremptory exception has alleged matters, which, even if proved by him, (and they were not), the Appellants have already shewn could not preclude them from their right of demanding a judicial *bornage*; and concludes in both pleas, that the action of the Appellants be dismissed with costs. The action of the Appellants was, notwithstanding these pleas of the Respondent, maintained by the Circuit Court; and, as the Appellants conceive, ought to have been so, with costs against the Respondent because of his rash resistance to the Appellants' just and legal demand (1).

2. By the surveyor's report, homologated by the judgment of the Circuit Court, it is ascertained that the Respondent

(1) 1. Fournel 249,

1 Merlin Rep. Jur. Vbo. Bornage.

"Ce partage de frais cesse d'avoir lieu s'il y a eu contradiction de la part d'un des deux voisins qui a succombé."

encroaches on the property of the Appellants to the extent of sixty-four superficial feet, and this extent of ground is declared to belong to the Appellants, and for this reason also, the Respondent ought to have been condemned to costs (1).

The grounds upon which the Appellants contend for a reversal of the judgment of the Circuit Court, confirmed by the Court below, in so far as they have been condemned to pay the costs of suit, may be succinctly stated thus :—

First—That the action instituted in the Circuit Court, was an action *en bornage*, which it is competent to every proprietor to bring against his neighbour, in order to obtain a judicial division of their respective lots, and that either party was at the same time Plaintiff and Defendant.

Secondly.—That it was most particularly required that the Appellants should proceed by action in this instance, as the Respondent encroached on the Appellants' property, in order to have their portion of the property allotted to them, by a judgment of the Court.

Thirdly—The costs should have been awarded against the Respondent by the Circuit Court, because he denied the Appellants' right of action, and prayed for the dismissal of the Appellants' action.

Fourthly—That by the Respondent's plea of peremptory exception, he alleges his readiness to comply with the Appellants' demand, and most inconsistently concludes for the dismissal of the action.

Fifthly—That by the report of the surveyor, the Respondent is declared to have encroached on the property of the Appellants to the extent of sixty-four superficial feet, and that as the judgment has the effect of restoring to the Appel-

(1) Pardessus, No. 129, 190 :—3 Toullier, No. 180, p. 124.

lants, that which was unjustly detained from them by the Respondent, the Appellants were entitled to costs.

Sir JAMES STUART, Bart. C. J. :—This appeal is in relation to a condemnation to costs against a Plaintiff in an action **EN BORNAGE**. We are of opinion that, under the circumstances of the case, the Respondent, (Defendant in the Court below,) ought to have been condemned to costs. His pleas were calculated to defeat the Plaintiff's action and to prevent the *bornage*. In cases of this kind, costs ought generally to be divided between the parties. But in this instance, the Defendant ought to have been condemned to costs. His defence denied the Plaintiff's right of action ; subsequently he abandoned that plea, and consented to the appointment of a surveyor, it is exactly as if his plea had been dismissed. It is an error to think that the Plaintiff was bound, before bringing his action, to summon his neighbour to draw lines. The judgment of the Court below must be reversed.

AYLWIN, Justice :—I concur in this judgment, but I must state that in this matter, wherein the value of the property in contestation is so small, it is to be regretted that the costs are so very enormous.

The Court, &c. :—Considering that the Respondent in the Circuit Court, by two several pleas, contested the right of the Appellants, to have and maintain this action, on which pleas, issues were joined by the said Appellants ; and considering that the Respondent, afterwards, waived and abandoned those pleas, by a consent rule for establishing boundaries, as prayed for, by the Appellants ; and considering also that the costs of the said unfounded defence, thus set up by the Respondent, as well as one half of the costs of the action, were justly and legally chargeable against him ; and that the Circuit Court, nevertheless, condemned the Appellants to pay the costs of this suit. It is by the Court, now here, adjudged, that the judgment appealed from,

namely, the judgment of the Superior Court rendered on the seventh day of April, in the year of our Lord one thousand eight hundred and fifty-two, in so far as the same relates to costs, be and the same is hereby reversed, annulled and made void ; and the Court, now here, proceeding to render such judgment in the premises, as by the Court below ought to have been rendered, it is by the said Court, now here, further adjudged, that so much of the judgment of the Circuit Court as relates to the costs of the suit, be and the same is hereby reversed, annulled and made void ; and also so much of the said judgment of the said Superior Court as relates to costs, be and the same is hereby reversed, annulled and made void ; and it is further, by the said Court now here, adjudged, that the costs of this action, in the said Circuit Court, be equally borne and paid by the said Appellants and the said Respondent, except those incurred on the pleas of the Respondent in the said Circuit Court ; and it is adjudged that the appellants do recover their costs, on the said last mentioned pleas, from and against the said Respondent ; and it is further adjudged that the said Appellants do recover their costs as well in the said Superior Court as in this Court, from and against the said Respondent.

CANNON, for Appellants.

ANDREWS & CAMPBELL, for Respondent.

SUPERIOR COURT.—QUEBEC.

Before BOWEN, Chief Justice, and DUVAL, Justice.

No. 373 { RUSSELL *et al.*,..... *Appellants.*
of { and
1852. { GRAVELEY..... *Respondent.*

The judgment obtained by the Plaintiff in the Court below exceeded £15, currency; the Plaintiff sued out a *saisie-arrest* upon which judgment was rendered for a sum also exceeding £15. The Appellants had intervened in the cause claiming of the monies arrested £4 13 6, and being dissatisfied with the judgment rendered upon the *saisie-arrest* they had appealed from the same.

Held, that in such case the demand of the Appellants not exceeding £15, they had no right of Appeal.

Le jugement obtenu par la Demanderesse en Cour Inférieure excédait £15, courant, la Demanderesse émettait un Writ de *saisie-arrest*, sur lequel jugement fut rendu pour une somme excédant aussi £15. Les Appellants étaient intervenus dans la cause réclamant £4 13 6, des argents saisis-arrestés, et se croyant lésés par le jugement rendu sur la *saisie-arrest*, ils en avaient appelés.

Jugé, que dans l'espèce la demande des Appellants n'excédant pas £15, ils n'avaient aucun droit d'Appel.

Judgment the 1st March, 1852.

The Respondent was the Plaintiff in the Court below, and having obtained a judgment against the Defendants, Goodman and others, for the sum of £48, subsequently sued out a Writ of *saisie-arrest* in the hands of Cole. The Garnishee declared he had in his hands, belonging to the Defendant Goodman, the sum of £22. Subsequently to the Garnishee making his declaration, the Appellants filed an Intervention in the cause, claiming to be paid by privilege, the sum of £4 13s. 6d. upon the monies in the hands of the Garnishee. Whilst the proceedings in the cause were in this state, the Plaintiff and Respondent moved for judgment against the Garnishee, the Court allowed the motion, and judgment was thereupon pronounced against the Garnishee on the 31st day of December, 1851.

It was from this judgment that the present Appeal had been instituted, and upon the return of the record before the Superior Court, the Respondent moved, "that all right and claim of the Appellants founded upon the Appeal in this cause instituted be declared forfeited, inasmuch as the claim of the Appellants in and by their intervention made does not amount to or exceed fifteen pounds, currency."

LELIEVRE, for Respondent.

The right of Appeal from judgments rendered in the Circuit Court for Lower Canada, to this Court, is regulated by the 53d sec. 12 Vict. Cap. 38, by which it is enacted, that an Appeal shall lie to the Superior Court from any judgment rendered by the Circuit Court, in any suit or action in which the sum of money or the value of the thing demanded shall exceed £15 ; now the amount demanded by the Appellants is only £4 13s. 6d., their interest does not exceed that amount, it is manifest therefore that they do not come within the provision of the 53d section just cited. If the Respondent had contested the Intervention of the Appellants, and had failed in her contestation, would she have had a right to claim an appeal in a matter which amounted only to the sum of £4 13s. 6d. ; clearly not. The rule must work both ways, and if the Respondent could have had no appeal in the case of a contestation, it follows that the Appellants can have no greater right. It is not the right of the Respondent that is in question, her rights are settled by the judgment upon the *saisie-arrêt* issued in the cause. The rights to be submitted to the Court in virtue of the appeal instituted are the rights of the Appellant to the extent of £4 13s. 6d. and no more. (1)

ANDREWS, for Appellants.

(1) 12 Vict. Cap. 38, Secs. 53 and 82 :—2 Howard's Rep, 73.

The judgment sought to be appealed from is not a judgment upon the intervention of the Appellants by which they claim a sum less than £15, but it is a judgment upon the Respondent's demand for a sum exceeding £15, *quoad* which demand the Appellants were *excipients* or Defendants. If the judgment upon the Respondent's motion had been adverse to her, she would have had the right to appeal, she must therefore be subject to her adversaries' having the same right ; *eadem debet esse ratio commodi et incommodi*.

It cannot be pretended that it is the amount of the Appellants' interest that decides their right to appeal, for it is beyond doubt, that a party demanding £20 and obtaining judgment for £15 only, may appeal though manifestly the amount of his interest is but to the extent of £15. Neither is it the amount for which the judgment is rendered (although if it were, the Appellants' right to appeal would be evident) that regulates the right of appeal ; as in an action for £20 and a judgment for £15, the Plaintiff would be entitled to appeal.

The 82nd Sec. of the 12 Vict. Chap. 38, enacts that " whenever the right to appeal from any judgment of any Court is dependant upon the amount in dispute, such amount shall be understood to be that *demanded* and not that recovered, if they be different." The question here then is, what is the amount demanded in the cause in which the Judgment complained of was rendered. The answer is a sum exceeding £15, rendered upon the Respondent's motion on her own demand. Had the Judgment in consequence of a contestation *en fait ou en droit* of the Appellants' Intervention been given upon their Intervention, it being for a less sum than £15, unquestionably they would have had no appeal. A case analogous to the present came before the Court of Queen's Bench. (1)

(1) 1st Lower Canada Reports 273, Gagy and Gagy,

There, an execution issued for an amount (non appealable) to which execution the Defendant filed an opposition pleading compensation, by another Judgment for an amount (appealable) : this opposition being dismissed, an appeal from the Judgment dismissing it was denied. The Chief Justice Sir JAMES STUART, in rendering the Judgment of the Court, stated the reason to be " Because the *execution* is the " *demand*, the *opposition* is only an *exception* to this demand, " it is then the execution that must regulate the appeal." The opposition was by the Court held not to be the demand, then how can the Intervention here be deemed the demand. There is no distinction to be made between an Opposition and an Intervention, an Intervention after Judgment is an Opposition, an Opposition before Judgment is an Intervention, every Intervening party or Opposant is, *quoad* his own Intervention or Opposition, a Plaintiff, and the party contesting them is an Excipient or Defendant. But every Intervening party, Opposant, *quoad* the party whose right he contests becomes an Excipient or Defendant, and if that Party is a Plaintiff, then clearly the Judgment rendered in the Court below was upon the Respondent's demand, to which we were Excipients : it could not have been upon the Appellants' Intervention since that is still pending and unadjudicated upon. Had the Respondent pursued the more correct course of moving for an order to have the monies in the hands of the *tiers-saisi* paid into Court, to await a Judgment of Distribution, and thereupon by the Clerk's Report of Distribution she had found herself excluded from a share of the monies, the whole amount having been given to other parties, and upon her contestation of such Report a dismissal of her contestation had followed, she would have had an undoubted right to appeal from such Judgment ; then if on the other hand, instead of having been excluded, she had been collocated for the whole amount of her demand, would not such other parties have had the same right to appeal, having contested her

collocation and failing therein, *eadem debet esse ratio commodi et incommodi*, and if they could have appealed from that Judgment, where the merits of their Intervention had been considered and where it might be contended the Judgment was given upon it, which was for an amount non-appealable, a *fortiori* would they have that right where their Intervention has been totally overlooked, and where the Judgment has been evidently rendered upon the Plaintiff's demand for a sum appealable. In the case now under consideration, the Appellants' Intervention was never brought under the consideration of the Court below, the Judgment was obtained by surprise, there had been no pleading, no *enquête*, nor any hearing upon the Appellants' Intervention, and therefore, there could have been no Judgment upon it. The Judgment, on the contrary, was given upon the Plaintiff's demand which was for a sum exceeding £15, and from which Judgment an appeal lies according to the 53d Sec. of the 12th Vict., Chap. 38, which is in these words "That from any Judgment rendered by the Circuit Court in any suit or action in which the sum of money demanded shall exceed £15 currency, an appeal shall lie to the Superior Court."

If this Court now decides this Appeal against the Respondent, her demand exceeding £20 sterling, she may again appeal to the Court of Queen's Bench. But the scale of justice cannot hang so unevenly as to grant her *trois degrés de justice* or gradations of Tribunals, and allow her Adversary but one.

The Court maintained the pretensions of the Respondent, and dismissed the Appeal.

The Judgment is as follows :

The Court having seen and examined the proceedings had and of record in this cause, and having heard the parties by

their Counsel respectively upon the motion of the said Emma Gravely, the Respondent, that all right and claim of the said Appellants founded upon the Appeal in this cause instituted, be declared forfeited and the said Appeal dismissed, with costs, and the record remitted to the Court below for the causes, matters and things in the said motion mentioned : it appearing that the amount claimed by the said Robert Henry Russell and John Partington Russell, as Intervening parties in the Court below, is the sum of four pounds, thirteen shillings and six pence, of lawful current money, and no more : It is hereby ordered and adjudged that the said Appellants, Robert Henry Russell and John Partington Russell, have forfeited all right and claim founded on the said Appeal, and that the said Appeal is hereby dismissed, with costs in favor of the said Emma Gravely against them the said Appellants.

ANDREWS and CAMPBELL, for Appellants.

LELIEVRE and ANGERS, for Respondent.

SUPERIOR COURT.—MONTREAL.

Before DAY, VANFELSON and MONDELET, Justices.

Ex parte—ST. LOUIS, PETITIONER.

Held, that Municipal Councils have an exclusive jurisdiction in controverted elections, and that no *mandamus* lies in such case.

Jugé, que les conseils municipaux ont une juridiction exclusive dans les contestations d'élection, et que le Writ de *Mandamus* ne doit pas émaner dans tel cas.

Judgment the 10th May, 1852.

This was a *Requête Libellée*, under the Writs of Prerogative Act, (1) praying for redress against a person who had usurped, as was alleged, a seat in the Council of the Borough of William Henry. The Defendant answered that the Council had in due form considered and maintained the validity of his election—the matter having been brought before that body. The Minutes of their proceedings were now before the Court. The Statute conferred on the Council the right to determine the point; and even if the Defendant had offered no further evidence than this, the Plaintiff could not have succeeded. *Requête* dismissed. (2)

(1) 12th Vic. Cap. 41. By the 11th Sec. it is among other things enacted "That after this Act shall come into force, whenever any Corporation, Public Body or Board shall refuse or neglect to make any election &c., or restore to their functions such of its members as shall have been removed without sufficient cause; and in all cases in which a Writ of *Mandamus* will lie and may be legally issued in England, it shall be lawful for any person interested in such Corporation, Public Body or Board, &c., to apply for a Writ of *Mandamus*, &c."

(2) In a case decided at Quebec, in December, 1852, No. 887, Giroux and the Municipality of the County of Quebec, the Writ of *Mandamus* has been allowed in the first instance under similar circumstances. This case and the one above mentioned will be reported at length.

AN INDEX

OF THE

PRINCIPAL MATTERS.

ACTIO PAULIANA.

Held, that the rescision of deeds, alleged in an opposition *afin d'annuler*, cannot be prayed for, unless all the parties to such deeds are joined in the proceedings; and that in such case, recourse must be had to the revocatory action or *actio Pauliana*.

Mignier vs. Mignier.

Jugé, que la nullité d'actes invoqués dans une opposition afin d'annuler, ne peut être demandée à moins que toutes les parties à ces actes ne soient mises en cause; et que dans tel cas, il faut intenter l'action révocatoire ou Paulienne.

ADVOCATES.

Held, that under the Act 13 & 14 Vic. ch. 37, sec. 15, Advocates, not practising, are not liable to the tax thereby imposed for paying reporters.

Monk vs. Viger.

Jugé, que sous l'acte de la 13 et 14 Vict. chap. 37, sec. 15, les Avocats qui ne pratiquent pas, ne sont pas tenus au paiement de la taxe imposée par cet Acte, pour la rétribution des rapporteurs.

AMENDMENT OF APPEAL BOND,

See APPEAL, s. 4.

AMEUBLISSEMENT.

Held—1. that the donation by an *ascendant* of one of the *conjointes*, in a marriage contract, of an immoveable, destined to enter into the community, is an *ameublisement* within the meaning of the law; 2. that such *ameublisement* has no effect except as regards the community, and between the *conjointes* themselves; 3. that the immoveable preserves its quality of *propre* up to the time of *partage*; 4. that the other *conjoint* being dead, and the child born of the marriage afterwards dying without issue and before *partage*, the *ameublisement* has no longer any effect, and the collateral heirs of the *conjoint*, in whose favor it was stipulated, can claim no rights in such immoveable.

Charlebois and Headley.

Jugé—1. que la donation par un *ascendant* d'un des *conjointes*, dans un contrat de mariage, d'un immeuble pour entrer en la communauté, est un *ameublisement* aux termes de la loi; 2. que tel *ameublisement* n'a d'effet que pour la communauté et vis-à-vis les *conjointes*; 3. que cet immeuble conserve sa qualité de *propre* jusqu'au *partage*; 4. que l'autre *conjoint* étant décédé, et l'enfant, issu du mariage, décédant ensuite sans hoirs de son corps, et avant *partage*, l'*ameublisement* n'a plus d'effet, et les héritiers collatéraux du *conjoint*, en faveur duquel l'*ameublisement* a été stipulé, ne peuvent rien réclamer dans cet immeuble.

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APPEAL.

1. Held, that a judgment of the Superior Court, refusing to grant a Writ of *Mandamus*, upon a Petition complaining that the Bishop of Quebec has refused to read the funeral service over the dead body of an individual, is a final judgment, and may be appealed from, according to the provisions of the 12 Vic. ch. 41, sec. 20.

Wurtle and The Lord Bishop of Quebec.

2. Held, that a Writ of Appeal, and not a Writ of Error, will lie in the case of a Jury Trial, when the grievance is not merely an error in a matter of law, and if there is no plea determined by the verdict of the jury, but a final adjudication upon law and fact.

Casey and Goldsmid.

3. Held, that an appeal lies from an order of the Superior Court discharging an Inscription for hearing in vacation, on the merits of an *exception à la forme*, without the consent in writing of the parties for such hearing out of term.

Dease and Taylor.

4. The omission by an Appellant to annex copy of an appeal bond, certified by the officer in whose custody it is kept of record, to his original petition in appeal, in compliance with the provisions of the 12th Vic. ch. 38, sec. 55, is fatal. The Court will not permit such Appellant to supply the deficiency by filing a copy of the bail bond.

Germain and Vézina.

5. The judgment obtained by the Plaintiff in the Court below exceeded £15, currency, the Plaintiff sued out a *saisie-arrest* upon which judgment was rendered for a sum also exceeding £15. The Appellants

1. Jugé, qu'un jugement de la Cour Supérieure, refusant l'émanation d'un Writ de *Mandamus*, sur requête exposant que l'Evêque de Québec a refusé de lire le service funèbre sur le corps d'un défunt, est un jugement final, dont il y a appel, aux termes de la 12 Vic. c. 41, s. 20.

2. Jugé, qu'il faut un Writ d'Appel, et non un Writ d'Erreur, (*Writ of Error*) dans le cas d'un procès par jury, si les griefs ne sont pas exclusivement fondés sur une erreur de droit, et si un point de loi n'a point été déterminé par le verdict du jury, mais s'il s'agit d'un jugement final fondé sur le fait et le droit.

3. Jugé, qu'il y a lieu d'appeler d'un ordre de la Cour Supérieure radiant une Inscription pour audition au mérite en vacance, sur une exception à la forme, en l'absence d'un consentement par écrit des parties pour telle audition hors du terme.

4. L'Omission par un Appelant d'annexer copie du cautionnement en appel, certifié par l'officier en la garde duquel il est demeuré, à la requête originale en appel, en conformité aux dispositions de la 12 Vic. cap. 38, sec. 55, est fatale. La cour ne permettra pas que l'Appelant en pareil cas supplée telle omission en produisant une copie du cautionnement.

5. Le jugement obtenu par la Demanderesse en Cour Inférieure excédait £15, courant, la Demanderesse émana un Writ de *saisie-arrest*, sur lequel jugement fut rendu pour une somme excédant aussi

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had intervened in the cause claiming of the monies arrested £4 13 6, and being dissatisfied with the judgment rendered upon the *saisie arrêt* they had appealed from the same.

Held, that in such case the demand of the Appellants not exceeding £15, they had no right of Appeal

£15. Les Appelants étaient intervenus dans la cause réclamant £4 13 6, des argent saisis-arrêtés, et se croyant lésés par le jugement rendu sur la saisie-arrêt, ils en avaient appelés.

Jugé, que dans l'espèce la demande des Appelants n'excédant pas £15, ils n'avaient aucun droit d'Appel.

Russell and Graveley.

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ASSIGNMENT.

1. Held, that a Bailiff's certificate cannot be taken as authentic to establish the signification of an assignment before notaries.

St. John vs. Delisle.

1. Jugé, que le certificat de l'Huissier n'est pas une preuve authentique de la signification d'un transport fait devant notaires.

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2. Held, that an assignment made by a *bailleur de fonds* of part of a sum of money due him for the price of the sale of an immoveable property, gives the assignee a right to be collocated concurrently with the assignor, upon the proceeds of the sale of such immoveable property, notwithstanding that such assignment is made by the assignor without any warranty whatsoever, the assignee accepting thereof *à ses frais, risques et périls*.

Wurtel vs. Henry.

Jugé, que le transport fait par un bailleur de fonds de partie d'une somme d'argent à lui due pour prix de la vente d'un immeuble, donne au cessionnaire le droit d'être colloqué concurremment avec le cédant, sur le produit de la vente du dit immeuble, nonobstant que tel transport soit fait par le cédant sans garantie quelconque, le cessionnaire l'acceptant à ses frais, risques et périls.

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BANKRUPT ESTATE.

Held, that in an action brought by the *Cessionnaire* of the Assignees of a Bankrupt Estate, who has purchased the outstanding debts of the estate, it is necessary to allege in the Declaration that the sale was made by the order of the Judge, and that the formalities required by the 67th section of the Bankrupt Act have been complied with.

Warner vs. Mernagh.

Jugé, que dans une action par le Cessionnaire des Syndics d'une Faillite, des créances de la faillite, il est nécessaire d'alléguer dans la déclaration que la vente a eu lieu par ordre du Juge, et que les formalités requises par la 67^e section de l'acte des Banqueroutes ont été observées.

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BIGAMY.

Held, that in an indictment for Bigamy, committed in a foreign country, it is necessary that the indictment should contain the alle-

Jugé, que dans un acte d'accusation pour Bigamie, commise dans un pays étranger, il est nécessaire d'alléguer dans tel acte que le prévenu

gations that the accused is a British subject, that he is or was resident in the Province, and that he left the same with intent to commit the offence.

Semble, that the word "elsewhere" in the provincial statute 4th and 5th Vic. ch. 27, sec. 22, extends to Bigamy committed in a foreign jurisdiction.

est un sujet anglais, qu'il est ou qu'il a été domicilié dans cette Province, et qu'il en est parti dans l'intention de commettre le crime.

Il semble, que le mot "ailleurs" dans le statut provincial de la 4e et 5e Vict. ch. 27, sec. 22, s'étend à la Bigamie commise dans une juridiction étrangère.

Regina vs. McQuiggan.

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BORNAGE.—Costs.

Held, that in an action *en bornage*, if the Defendant denies the Plaintiff's right of action, he must be condemned to pay costs.

Weymess and Cook.

Jugé, que si dans une action *en bornage*, le Défendeur nie au Demandeur son droit d'action, il doit être condamné aux frais.

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CANONICAL DECREE,

See CERTIORARI.

CAPIAS, *Liability of Bail.*

Held, that the liability of the bail to the Sheriff on a Writ of *Cap. ad Resp.*, is for the amount endorsed on the Writ, and no more: That where the Sheriff has taken bail for double the amount of the debt sworn to in the affidavit, and the Plaintiff has afterwards obtained a judgment for a larger amount, the liability of the bail cannot be extended beyond the amount sworn to in the affidavit, and endorsed on the Writ of *Cap. ad Resp.*: That an assignment by the joint Sheriff under their customary signature, and in the form used in England, is a good assignment: That a motion by the Defendant to be permitted to put in special bail for the amount sworn to and endorsed on the Writ, which motion was rejected, is not a sufficient compliance with the Writ, so as to relieve the bail to the Sheriff.

Jugé, que l'obligation contractée en vertu d'un cautionnement donné au Shérif sur un *Cap. ad Resp.*, est pour le montant porté au dos du Bref, et pas davantage: Que dans l'espèce où le Shérif a pris le cautionnement pour le double du montant mentionné en l'affidavit, et que le Demandeur a obtenu jugement pour une plus forte somme, l'obligation de la caution ne peut excéder le montant mentionné dans l'affidavit, et endossé sur le Writ de *Capias*: Que le transport par des Shérifs conjoints sous leur signature ordinaire, et dans la forme usitée en Angleterre, est valable: Qu'une motion faite par le Défendeur à l'effet qu'il lui soit permis de donner un cautionnement spécial pour le montant mentionné en l'affidavit, et porté sur le Writ, laquelle a été rejetée, n'est pas une exécution suffisante des exigences du Writ, pour libérer les cautions envers le Shérif.

Torrance vs. Gilmour.

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CERTIORARI.

1. Held, that the ecclesiastical decree of His Grace the Archbishop of Quebec, for the erection of a parish, is not a civil proceeding subject to the revision of the Superior Court by means of a Writ of *Certiorari*: That such proceeding is purely ecclesiastical, without the jurisdiction of the Superior Court, so long as no proceedings are had for the purpose of obtaining a ratification of such decree by the civil authorities.

Guay. Ex parte,

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2. The Defendant, in the case of a Writ of *Certiorari*, cannot compel the Petitioner to proceed upon such Writ by a mere motion, the proceedings to be had in such case must be by means of a *procedendo*.

Morrisset vs. Carier.

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1. Jugé, que le décret canonique de Sa Grâce l'Archevêque de Québec, érigeant une paroisse, n'est pas une procédure civile qui puisse être révisée par la Cour Supérieure au moyen d'un Writ de *Certiorari*: Que ce n'est qu'une procédure purement ecclésiastique, hors de la juridiction de cette Cour, tant qu'il n'y a point de procédure pour obtenir la ratification civile de tel décret.

2. Le Défendeur, dans le cas d'un Writ de *Certiorari*, ne peut contraindre le Requérent à procéder sur tel Writ au moyen d'une simple motion à cet effet, il faut procéder en pareil cas par le moyen du *procedendo*.

COMMUNITY.

Held, that a party who contracts a second marriage, cannot dispose by marriage contract in favor of his second wife of any portion of the *conquêts* of the first community, or of a greater portion of the *acquêts* than that accruing to the child taking the smallest share.

Keith vs. Bigelow.

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Jugé, qu'un homme qui convole en secondes noces, ne peut, par son contrat de mariage avec sa seconde femme, disposer en sa faveur d'aucune portion des *conquêts* de la première communauté, ou d'une plus grande portion des *acquêts* que la part afférente à l'enfant le moins prenant.

CONTESTATION OF OPPOSITIONS,

See PLEADINGS.

CONTRACT OF MARRIAGE,

See COMMUNITY.

CONTRAINTE AGAINST A SHERIFF.

Held, that an interlocutory judgment requiring Boston and Coffin, joint-sheriff, to deliver up certain machinery seized under process of revendication cannot be made executory against Boston alone, he having since the judgment become

Jugé, qu'un ordre donné par la Cour à Boston et Coffin, shérifs conjoints, de livrer une machine saisie par voie de revendication, ne peut être mis en force contre Boston seul, resté seul Shérif depuis l'ordre donné, en autant que cet ordre ne

sole Sheriff, and the judgment not having been signified to or made executory against him :—The rule for *contrainte* discharged.

McPherson vs. Irwin.

lui avait pas été signifié, ni déclaré exécutoire contre lui :— La règle pour *contrainte* contre lui à cet effet mise au néant.

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COSTS.—See also BORNAGE.

1. Held, that a Plaintiff has a right to be collocated by privilege, for all his costs of suit, when such costs are indispensably necessary to obtain the seizure and sale of the defendant's real estate.

Garneau vs. Fortin.

1. Jugé, qu'un Demandeur a droit d'être colloqué par privilège pour ses frais d'action, lorsque ces frais sont indispensables pour poursuivre la saisie et vente des immeubles du Défendeur.

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2. Held, that costs in a cause cannot be attached by a creditor, during the pendency of a cause, as belonging to the party, to the prejudice of the Attorney.

Gauthier vs. Lemieux.

2. Jugé, que les frais dans une cause ne peuvent être saisis-arrêtés, pendant l'instance, comme appartenant à la partie, par un tiers, son créancier, au préjudice du Procureur.

273

CURATOR TO VACANT ESTATE.

Held, that a creditor who has obtained a judgment against a curator to a vacant estate, can lawfully direct a personal action against such curator to compel him to render an account of his administration. (Sir JAMES STUART *dissentiente* upon the principle that the curator ought to have been made a party to the cause,) judgment of the Superior Court reversed.

Valleau and Oliver.

Jugé, qu'un créancier qui a obtenu un jugement contre un curateur à une succession vacante, peut valablement diriger une action personnelle contre tel curateur pour lui faire rendre un compte de sa gestion. (Sir JAMES STUART *dissentiente* sur le principe que le curateur aurait dû être mis en cause,) jugement de la Cour Supérieure infirmé.

462

CURATOR,

See PLEADINGS, s. 3.

DELIVERY.

1. The Defendant undertook to deliver, and the Plaintiff agreed to receive, 14,000 feet Birch timber, merchantable and averaging a certain size, the said timber to be piled on the Defendant's wharves during the winter of 1844-5, and to be delivered, as required by the Plaintiff, during the ensuing season

1. Le Défendeur entreprit de livrer, et le Demandeur de recevoir, 14,000 pieds de mérisier, bois marchand et de certaine dimension spécifique, lequel bois serait empilé sur les quais du Défendeur, pendant l'hiver de 1844-5, et livré au Demandeur à mesure qu'il en aurait besoin, pendant la saison de la na-

of navigation ; a quantity of timber, piled upon the wharves of the Defendant, was destroyed by fire during the winter, before it had been measured as between the Plaintiff and the Defendant. Held, that there had been no delivery of any timber by the Defendant to the Plaintiff, 1stly. Because there had been no measurement of the Timber ; 2ndly. Because, therefore, the timber had not been ascertained to be of the requisite average size ; and 3rdly. Because the timber had not been ascertained to be of the required quality.

Levey vs. Lowndes.

Restitution—Damages.

2. Held, that in the case of non-execution of a contract of sale of a specific and determined article, destroyed by *vis major*, without any fault of the vendor, and which cannot be replaced, an action can be maintained for the restitution of monies paid in advance of such contract, but cannot be maintained for damages by reason of the non-execution of the same : judgment of the Superior Court, accordingly, confirmed as to the restitution, and reversed as to the damages awarded.

Russel and Levey.

3. Where goods deliverable to "order or assigns," are landed from a vessel after the expiration of the delay allowed by law to the importer to land the same, the Captain is not liable for any damages that may accrue thereto, after they have been placed upon the wharf.

Scott vs. Hescroff.

DONATION.

Held, that a donation, *à titre onéreux*, containing charges equal to the value of the immoveable property thereby given, cannot be rescinded by reason of the subsequent birth of a child, such donation being in the nature of a sale.

Sirois vs. Michaud.

vigation ensuivante ; une quantité de bois, empilée sur les quais du Défendeur, fut détruite pendant l'hiver, avant que ce bois eut été mesuré conjointement par le Demandeur et le Défendeur. Jugé, qu'il n'y avait eu aucune livraison par le Défendeur au Demandeur, 1o. Parcequ'il n'y avait eu aucun mesurage du bois en question ; 2o. Parceque, conséquemment, il n'avait pas été constaté que le dit bois fut de la dimension spécifique requise ; et 3o. Parceque, enfin, le dit bois n'avait pas été constaté être de la qualité requise.

2. Jugé, que dans le cas de la non-exécution d'un contrat de vente d'un objet spécifique et déterminé, détruit par force majeure, sans la faute du vendeur, et qui ne peut être remplacé, une action peut être maintenue pour la restitution des deniers payés en avance sur le contrat, mais ne peut être maintenue pour dommages résultant de la non-exécution du contrat : jugement de la Cour Supérieure, en conséquence confirmé quant à la restitution, et infirmé quant aux dommages accordés.

3. Lorsque des marchandises qui doivent être livrées "à ordre" sont déchargées d'un vaisseau à l'expiration du délai accordé par la loi à l'importateur pour les faire décharger, le Maître du vaisseau n'est pas responsable des dommages qu'elles peuvent éprouver après qu'elles ont été déposées sur le quai.

Jugé, qu'une donation, à titre onéreux, dont les charges égalent la valeur de l'immeuble donné, ne peut être annulée pour cause de survenance d'enfant, car dans ce cas, elle équivaut à vente.

257

457

477

177

EMPHYTHÉOSE.

1. Held, that the sale of the unexpired period of an emphyteotic lease, described as such in the Sheriff's advertisement, imposes upon the purchaser the obligation of paying the stipulated rent of such lease, although this is not made an express condition of the sale in such advertisement, and although there be no opposition *afin de charge* for the preservation of such rent; and consequently, that the creditor of the rent of such emphyteotic lease cannot claim any indemnity upon the price of sale, upon the pretext that the rent aforesaid and the other rights appertaining to him under the lease, are lost, by reason of his not having filed an opposition *afin de charge*.

Méthot vs. O'Callaghan.

331

2. Held, that a proprietor, who has allowed his property to be sold upon an execution against a Defendant, who held it merely under an emphyteotic lease, can claim an indemnity for the loss of his property upon the price of the sale of such property.

Murphy vs. O'Donovan.

333

ENGLISH CIVIL LAW.

Delivery and Possession.

Held—1. That the English Civil Laws have not been introduced into Lower Canada by the Proclamation of 1763, nor by the Imperial Act (Quebec, Act) of 1774: 2. That by the Imperial Act 6 Geo. IV. chap. 59, the English Laws have only been introduced into Lower Canada, in respect of lands held in free and common soccage, in the particulars of conveyance, descent or inheritance, and dower: 3. That in order to acquire a valid title to real estate, there must be an actual delivery (*tradition*): 4. That to acquire a title by prescription under the French Law, there must be an absolute physical possession (*possession naturelle*).

Sir James Stuart vs. Bowman.

1. Jugé, que la vente de ce qui reste à courir d'un bail emphytéotique, désigné comme tel dans l'avertissement du Shérif, impose à l'adjudicataire l'obligation de payer le canon emphytéotique, quoique cela ne soit pas expressément dit dans cet avertissement, et quoiqu'il n'y ait pas d'opposition *afin de charge* à cet effet; et conséquemment, que le créancier, à qui est dû cette rente ou canon emphytéotique, ne peut pas demander à se faire indemniser à même le prix de l'adjudication, sous le prétexte que sa rente et ses autres droits, résultant du bail, sont perdus, parce qu'il n'a pas fait d'opposition *afin de charge*.

2. Jugé, qu'un propriétaire, qui a laissé vendre sa propriété sur un Défendeur, qui ne la détenait qu'à titre de bail emphytéotique, peut demander d'être indemnisé de la perte de sa propriété sur le prix de l'adjudication.

Jugé,—1. Que le Droit Civil Anglais n'a pas été introduit dans le Bas-Canada par la Proclamation de 1763, ni par l'Acte Impérial (l'Acte de Québec) de 1774: 2. Que par l'Acte Impérial de la 6^{me} Geo. IV, cap. 59, les Lois Anglaises n'ont été introduites dans le Bas-Canada, par rapport aux terres tenues en franc et commun soccage, que dans le cas où il s'agit de ventes, ou cessions, successions ou douaires: 3. Que pour obtenir un titre valable quant aux propriétés immobilières il faut qu'il y ait tradition réelle: 4. Que pour acquérir au moyen de la prescription, sous l'empire du Droit Français, la possession naturelle est nécessaire.

369

ENQUÊTES.

1. Held, that in the absence of the return to a *Com. Rog.* issued at the instance of the Plaintiff, a Defendant cannot be compelled to proceed with his *Enquête*.

Macfarlane vs. Bresler.

238

2. Held, that in the absence of any restraining power in the rules of practice, or of any order, confining *Enquête* days in term to cases *Ex parte*, the Court has no power to prevent a party from proceeding with a contested case during the *Enquête* days in term.

La Banque du Peuple vs. Roy.

1. Le Défendeur ne peut être contraint de procéder à son *Enquête* avant le Rapport d'une Commission Rogatoire émanée sur la demande du Demandeur.

2. Jugé, Qu'en l'absence de dispositions restrictives dans les règles de pratique, ou d'ordre quelconque, restreignant les jours d'*Enquête* pendant le terme aux causes *Ex parte*, la Cour n'a pas le pouvoir d'empêcher une partie de procéder à instruire une cause contestée pendant les jours d'*enquête* durant le terme.

239

ERROR.

Payment made by Error.

Held 1. That the *erreur de droit* may give rise to an action for the recovery back of money paid.

2. That in the case submitted, a party, who has voluntarily paid a tax imposed by a bye-law of a municipal corporation, which bye-law is declared by the Court to be void, has a right to recover back what he has so paid.

Leprohon and the Mayor, &c., of Montreal.

180

Jugé 1. Que l'erreur de droit peut donner ouverture à l'action en restitution.

2. Que dans l'espèce, un citoyen qui a volontairement payé une taxe imposée par un règlement de la corporation municipale, que la Cour déclare nul, a droit au remboursement de ce qu'il a ainsi payé.

EVIDENCE.

1. Held, that the certificate of a Notary, as to the state of mind of a party at the time of making her will, that she was *saine d'entendement*, is mere matter of style, and may be contradicted by parol evidence; the Notary is not bound to write the original or minute of the same with his own hand.

Clarke vs. Clarke.

2. The former deposition of a witness, may be used by or read to him, upon a subsequent examination, though in a different proceeding, to refresh his memory.

The City Bank vs. Coles.

1. Jugé, que le certificat d'un notaire, quant à l'état mental d'une personne à l'instant où elle fait son testament, qu'elle était *saine d'entendement*, est purement de style, et que cet énoncé peut être contredit par témoignage verbal; le Notaire qui exécute un testament n'est pas tenu d'écrire l'original ou la minute de tel testament de sa propre main.

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2. Un témoin peut se servir d'une déposition par lui déjà faite, ou cette déposition peut lui être lue, sur son examen subséquent, même dans une procédure différente, pour lui rafraîchir la mémoire.

16

3. Held, that a Defendant cannot be compelled to appear, before the return of a Writ of Summons to show cause why certain witnesses, about to leave the Province, should not be examined; that depositions taken in such case before appearance of Defendant, and return of summons are illegal; that the Inferior Court before adjudicating upon the merits, ought to have determined as to the validity of such evidence, so as to afford the party an opportunity of substituting legal evidence in lieu thereof; that under such circumstances the party, whose evidence has been rejected, be allowed to re-open the *enquête*.

That inasmuch as the adverse party did not move, *in limine*, to reject such evidence, each party shall pay his own costs.

Malone and Tate.

4. Held, that in a case where the relations of a party may be heard to prove facts which have occurred in the interior of a family, nevertheless, if any other of the facts in the cause can be established by witnesses who are not related, and such witnesses are not called, the proof will be deemed insufficient.

Caron vs. Michaud.

5. Held, that a partition among co-heirs, duly homologated, is evidence, as against third parties, of the quality assumed by such heirs, and it is not necessary that certificates of baptism and of marriage should be produced.

Mallory and Hart.

6. Held, that all documentary evidence relative to the issues raised between two opposants must be filed by such opposants, and it is not sufficient that such evidence be already filed by other parties to the record.

Kelly vs. Fraser.

3. Jugé, qu'un Défendeur n'est pas tenu de comparaître, avant le retour du Bref de Sommation, pour montrer cause pourquoi certains témoins, sur le point de laisser la Province, ne seraient pas examinés; que des dépositions prises en pareil cas sont illégales; que la Cour Inférieure, avant de juger le mérite, devait se prononcer sur la validité de cette preuve afin de fournir à la partie le moyen d'y suppléer; qu'en pareil cas la partie privée de sa preuve, a droit de recommencer l'*enquête*.

Que la partie adverse n'ayant pas demandé, dès le commencement de la procédure, le rejet de cette preuve, chaque partie devra payer ses frais.

99

4. Jugé, que dans une cause où les parents des parties peuvent être entendus comme témoins pour prouver des faits domestiques, néanmoins, si aucun des autres faits dans la cause peuvent être prouvés par des témoins étrangers, et que ces témoins ne soient pas appelés, la preuve sera regardée comme insuffisante.

192

5. Jugé, qu'un partage homologué en justice entre co-héritiers, fait preuve à l'égard de tiers de la qualité de tels héritiers, sans qu'il soit nécessaire de produire les certificats de baptême et de mariage.

345

6. Jugé, que toute preuve écrite, ayant rapport à une contestation entre deux Opposants, doit être produite par eux, et il ne suffit pas que tels documents aient déjà été produits par d'autres parties dans la cause.

368

EXECUTION—See SEIZURE.

FOLLE ENCHERE.

1. Held, that any opposing creditor may move *à folle enchère* against an *adjudicataire* who has neglected to pay his purchase money.

1. Jugé, que tout Opposant, partie à un décret, peut demander la folle enchère contre l'adjudicataire qui n'a point payé son prix d'acquisition.

Guenette vs. Blanchette.

64

2. Held, that after the *folle enchère* has been ordered against a purchaser, (*adjudicataire*) he may annul that proceeding by paying his purchase money, and the costs incurred on the *folle enchère*.

2. Jugé, qu'après que la folle enchère a été ordonnée contre un adjudicataire, il peut y mettre fin, en payant son prix d'acquisition et les frais encourus sur la folle enchère.

Langevin vs. Garon.

125

GUARDIAN.

1. A guardian of goods and chattels seized under a Writ of Revendication addressed to the sheriff, has no right of action against the party at whose suit the Writ issued, for the recovery of the monies expended by him as such guardian in and about the safe keeping and custody of such goods and chattels.

1. Un gardien d'effets saisis en vertu d'un Writ de Saisie-Revendication adressé au shérif, n'a aucun droit d'action contre la partie à la poursuite de laquelle le Writ est émané, pour le recouvrement d'argents avancés par tel gardien pour la préservation et pour la garde des effets saisis revendiqués.

Dinning vs. Jeffery.

118

2. Held, that a guardian of goods and chattels seized under a Writ of Revendication addressed to the Sheriff, has a right of action as well against the party at whose suit the Writ issued, as against the Sheriff, for the recovery of the monies expended by him as such guardian in and about the safe-keeping and custody of such goods and chattels.

2. Jugé, qu'un gardien d'effets saisis au moyen d'un Writ de Revendication adressé au shérif, a son action aussi bien contre la partie qui a fait émaner ce Writ que contre le shérif, pour le recouvrement de ses dépenses encourues comme gardien pour la conservation des dits effets.

Judgment of the Superior Court at Quebec, reversed.

Jugement de la Cour Supérieure de Québec, infirmé.

Dinning and Jeffery.

360

INSCRIPTION—See PLEADINGS, s. 9.

INSURANCE—Policy of Insurance.

A policy of Insurance, describing the premises as a house, bounded in rear by a stone building covered with tin, and by a yard, in which yard there was being erected a first class store which would commu-

Une police d'assurance, décrivant la propriété assurée comme une maison, bornée en profondeur par un hangar en pierre couvert en fer-blanc, et par une cour où l'on construit un hangar de première classe

nicate with the building insured, held to be incorrect, and therefore null, it being proved that there was between the house and the stone building, a brick building, covered with shingles, communicating to both by doors.

Casey vs. Goldsmid.

qui communiquera avec la maison assurée, jugée incorrecte, et nulle, parcequ'il était prouvé, qu'entre la maison et le hangar il y avait un autre bâtiment couvert en bardeaux, communiquant par des portes aux deux autres bâtiments.

200

INTERDICTION, EFFECT THEREOF.

Held, that an interdiction and the appointment of a counsel thereupon, obtained at the instance of the party interdicted are void, in so far as a creditor with whom the party interdicted has contracted is concerned; that such contract is binding, although the counsel was not a party thereto, if the interdiction has not been made known to the creditor, and if such interdiction has not been inscribed upon the register kept for that purpose.

De Chantal and De Chantal.

Jugé, qu'une interdiction et la nomination d'un conseil, obtenus à la requête de l'interdit lui-même, sont de nul effet, quant à un créancier avec lequel l'interdit a contracté; que le contrat est valable, quoique le conseil n'y fut pas partie, si l'interdiction n'a pas été dénoncée au créancier, et si elle n'a pas été inscrite au tableau des interdits.

469

INTEREST.

Held, that in an action for arrears of interest, interest upon the sum demanded may be awarded.

Anderson vs. Dessaulles

Jugé, que sur une demande pour arrérages d'intérêts, il doit être adjugé des intérêts moratoires.

48

INTERVENTION—See PLEADINGS, s. 9.

LEASE, TRANSFER OF.

Held, that a lease d'affermage partiaire, by which the lessee has undertaken to perform personally certain obligations, cannot be, by such lessee, assigned to a third party: that the assignment of such lease gives the lessor the right of demanding the rescision of the contract: that the resiliation of such assignment, the assignment having been acted upon, and the action to rescind the lease having been instituted, cannot deprive the lessor of his absolute right to cause the original lease to be rescinded.

Hudon vs. Hudon.

Jugé, qu'un bail d'affermage partiaire, imposant au preneur certaines obligations qu'il doit accomplir en personne, n'est pas cessible: que la cession de tel bail donne droit au bailleur d'en demander l'annulation: que la résiliation de telle cession, les choses n'étant plus entières, et la demande en rescision portée, ne peut priver le bailleur de son droit absolu de faire annuler tel bail.

30

LESSOR AND LESSEE.

Held, that where a house has been sold during the pendency of a lease, and the lessee, on the written order of the lessor, has gone out, not having been notified to do so by the new proprietor, he cannot maintain an action of damages against the lessor, who had no authority to expel him.

McGinnis and Hodge.

Jugé, que dans le cas de vente d'une maison durant un bail, et de l'abandon de la maison par le locataire sur un ordre par écrit du locateur, sans la mise en demeure par le nouveau propriétaire, ce locataire ne peut recouvrer de dommages de ce locateur, qui n'avait aucun droit de l'expulser.

447

LETTERS PATENT.

Held, that a party who has effected an improvement in Fire-Engines, by a new combination of old parts, whereby greater results are obtained, is entitled to take out and maintain Letters Patent for his exclusive right.

Muir vs. Perry.

Jugé, que celui qui a fait des améliorations aux Pompes-à-feu, par une nouvelle combinaison des parties qui les composent, de manière à en obtenir des résultats plus avantageux, a droit de prendre et faire maintenir des Lettres Patentes pour s'en assurer le privilège exclusif.

305

MACHINE.

Feloniously breaking a Machine.

An Apparatus for manufacturing potash, consisting of Ovens, Kettles, Tubs, &c., is not a Machine or Engine within the meaning of the 4th and 5th Victoria, cap. 26, sec. 5; the cutting, breaking or damaging of which is felonious.

Regina vs. Dogherty.

Un appareil pour la manufacture de Potasse, consistant en Fours, Chaudrons, Cuves, &c, n'est pas une machine ou engin, aux termes de l'Acte des 4e et 5e Vic. ch. 26, sec. 5, dont la destruction ou détérioration est une félonie.

255

MANDAMUS, APPEAL IN CASE OF.

See APPEAL, s. 1, and MUNICIPAL ELECTIONS.

MINOR.

Held, that a father cannot sue for his minor child as his natural tutor, nor maintain his own action, if he has joined it to that brought for his son as such natural tutor.

Petit vs. Béchette.

Jugé, qu'un père ne peut porter une action pour son fils mineur comme son tuteur naturel, ni maintenir sa propre action, s'il l'a jointe à celle portée pour son fils en telle qualité.

367

MORTGAGE.

1. Held, that the registration of a deed of sale subsequent to the coming into force of the Ordinance 4 Vict. ch. 30, is not required to preserve the privilege of *Baillieur de Fonds*.

Wilson and Atkinson.

1. Jugé, qu'il n'est pas nécessaire d'enregistrer un contrat de vente postérieur à la mise en force de l'Ordonnance 4 Vict. ch. 30, pour conserver au vendeur son privilège de *Baillieur de Fonds*,

5

2. Held, that a contract of marriage, assigning a life rent to a wife, must be registered to preserve the right of mortgage according to the date of such contract.

Panet vs. Larue.

3. Held, that an Heir claiming his share of the moveable property of a community in the estate of his mother, will lose his rank of mortgage upon the real estate of his father, appointed his tutor, if he has not caused registration of the marriage contract, the act of tutorship or the deed of partition.

Girard vs. Blais.

4. Held, that a contract of marriage executed before the enactment of the 4 Vic. cap. 30, must have been registered in the delay fixed by the Ordinance, to preserve the rank of the mortgage created by it.

That the Plaintiff in a cause has a right to be collocated, by privilege, for all his costs of suit, when such costs are indispensably necessary to obtain the seizure and sale of the Defendant's real estate.

Garneau vs. Fortin.

5. Held, that it is not necessary to register contracts of marriage to preserve rights of ownership thereby secured, and that children, representing their mother, may claim, by right of community, the value of one half of an immoveable, *propre ameubli*, which they have allowed to be sold.

Nadeau vs. Dumon.

6. The validity of a contestation to a report of distribution, by which the claims of a *bailleur de fonds* were passed over, being called in question, and the Court pronouncing its validity, held by Sir JAMES STUART, Baronet, Chief Justice, that the *bailleur de fonds*, either anterior or posterior to the Ordinance of the 4th Vic. Cap. 30, is bound to enregister his title.

Vondenvelde and Hart.

2. Jugé, qu'un contrat de mariage, assignant une rente viagère à la femme, doit être enregistré, pour lui conserver son rang d'hypothèque.

83

3. Jugé, qu'un enfant, réclamant sa part mobilière de communauté dans la succession de sa mère, aura perdu son rang d'hypothèque sur les biens de son père, son tuteur, s'il n'a fait enregistrer le contrat de mariage, l'acte de tutelle ou le partage.

87

4. Jugé, qu'un contrat de mariage exécuté avant l'Ordonnance de la 4 Vic. c. 30, doit avoir été enregistré dans le délai voulu par l'Ordonnance pour conserver son rang d'hypothèque.

Que le Demandeur dans une cause a droit d'être colloqué par privilège pour tous ses frais d'action, lorsque ces frais sont indispensables pour poursuivre la saisie et vente des immeubles d'un Défendeur.

115

5. Jugé, que pour la conservation des droits de propriété, il n'est pas nécessaire d'enregistrer les contrats de mariage dont ils résultent, et que conséquemment, des enfants représentant leur mère, peuvent réclamer la valeur de la moitié d'un *propre ameubli*, à titre de communs, lequel ils auraient laissé vendre.

196

6. La validité d'une contestation d'un rapport de distribution, dans lequel les réclamations d'un *bailleur de fonds* ont été omises, étant mise en question, et la Cour rejetant cette contestation comme irrégulière, jugé par Sir JAMES STUART, Baronet, Juge-en-Chief, que le *bailleur de fonds*, soit antérieur soit postérieur à l'Ordonnance de la 4e Vic. c. 30, doit enregistrer son titre.

353

7. Held, that under the Imperial Act of the 9th Geo. IV., Chap. 77, (in force in this Province) no general mortgage can be created against lands situate in the Townships, and held in free and common soccage.

Boston vs. Classon.

8. Held, that a special mortgage is no bar to the exception of *discussion*, and that the *tiers-détenteur* of land, who has been sued by the original vendor, may validly plead that exception.

Also, that the *tiers-détenteur* has no right to claim to hold the property until his improvements and ameliorations have been paid.

Price vs. Nelson.

7. Jugé, que sous le Statut Impérial de la 9e Geo. IV, ch. 77, (en force en cette Province) aucune hypothèque générale ne peut être créée et assise sur les terres situées dans les Townships, et tenues en franc et commun soccage.

449

8. Jugé, que l'hypothèque spéciale n'est pas une fin de non-recevoir contre l'exception de discussion, et que le tiers-détenteur poursuivi par le vendeur originaire, peut lui opposer cette exception de discussion.

Aussi, que le tiers-détenteur ne peut réclamer le droit de retention jusqu'au paiement de ses impenses et améliorations.

455

MUNICIPAL ELECTIONS, CONTESTATION OF

Mandamus refused in cases of controverted Municipal Elections.

Mandamus refusé dans le cas de contestation d'Elections Municipales.

Ex parte—St. Louis.

500

OPPOSITION *afin de charge*,

See EMPHIRESE.

PARISH, DIVISION OF,

See CERTIORARI.

PETITORY ACTION.

The purchaser of an Immoveable property, who has neither had seizin nor possession, cannot maintain the petitory action.

L'acquéreur d'un Immeuble, qui n'a eu ni la tradition ni la possession, ne peut porter l'action pétitoire.

Brochu vs. Fitzback.

7

PLEADINGS.

Contestation of Report of Distribution.

1. Held, that a contestation to separate and distinct items of collocation in a report of distribution, interesting different parties, cannot be raised in one and the same paper, and that copies must be served on the parties whose claims are contested: the eight days within which a contestation is required to be filed are not juridical days.

1. Jugé, que la contestation d'un rapport de distribution, quant à des items distincts et séparés ayant rapport à différentes parties, ne peut être faite par une seule et même contestation, et que copies de telle contestation doivent être signifiées aux parties dont les réclamations sont contestées: les huit jours dans lesquels une contestation doit être filée ne sont pas huit jours juridiques.

Burroughs—Ex parte.

9

Necessary allegation in an Information for Goods seized by the Customs.

2. Held, that in an information at the suit of the Crown, the allegation that the goods sought to be forfeited, had been seized as having been imported into the Province without the duties being paid &c., is insufficient, and that there must be a substantive allegation that they were imported, and brought in, in violation of the Custom House regulations: also, that the omission of the words "against the form of the Statute," &c., is fatal.

The Solicitor General vs. two cases of Planes and Darling.

2. Jugé, que dans une information à la poursuite de la Couronne, l'allégué que les effets que l'on veut faire déclarer confisqués, ont été saisis comme importés en cette Province sans que les droits aient été payés, etc., est insuffisant, et qu'il doit y avoir un allégué spécial, que tels effets ont été importés en contravention aux règlements des Douanes: aussi, que l'omission des mots "contre la forme du Statut," etc., est fatale.

20

Action by Curator.

3. Held, that a curator to a vacant estate cannot be sued by a third party to whom he has assigned his claim against such vacant estate; inasmuch as the curator cannot sue himself or be sued by his own assignee.

Tessier vs. Tessier.

3. Jugé, qu'un curateur à une succession vacante ne peut pas être poursuivi par un tiers auquel il aurait transporté sa créance contre telle succession; le curateur ne pouvant se poursuivre lui-même, ou se faire poursuivre par son propre cessionnaire.

63

Défense en fait.

4. Held, that under the 12 Vict. cap. 38, sec. 85, it is necessary, in a *Défense au fonds en fait*, expressly to deny every fact alleged in the Plaintiff's declaration, otherwise such facts will be held to be admitted.

Copps and Copps.

4. Jugé, que sous la 12 Vic. chap. 38, sec. 85, il est nécessaire, dans une *Défense au fonds en fait*, de nier expressément chacun des faits allégués en la déclaration du Demandeur, autrement tels faits seront pris pour admis.

105

5. Held, that the general answer to a plea is sufficient to put the Defendant to the proof of the allegations contained in such plea.

St. John vs. Delisle.

5. Jugé, qu'une réponse générale à un plaidoyer est suffisante pour obliger le Défendeur à la preuve des allégués de tel plaidoyer.

150

Defense en Droit.

6. Held, that an objection to the legality of an exception or plea cannot be raised but by demurring or *défense en droit*, containing the grounds to be urged against such exception or plea.

Trudelle vs. Allard.

6. Jugé qu'on ne peut mettre en question la légalité d'une exception ou d'un plaidoyer quelconque (*plea*) qu'au moyen d'un *demurrer*, (*défense en droit*), contenant les moyens de droit que l'on entend faire valoir contre telle exception ou plaidoyer.

178

Intervention.

7. Held, that where a sum of money, forming part of a larger sum for which the Defendant is sued, has been paid to the Plaintiff during the pendency of the action, such matter cannot be set up in a *demande en intervention*, but that it should be by a supplementary plea. Intervention filed on such grounds dismissed on motion.

Lyman vs. Perkins and Perkins

304

Infringement of Right of Patent.

8. Held, that in an action for an infringement of a right of Patent for Lower Canada, the allegation of an infringement "in the County of Montreal" is sufficient indication of the place where the infringement took place.

Prowse vs. Panuelo.

8. Jugé, que dans une action pour infraction d'un droit de Patente pour le Bas-Canada, l'allégué que cette infraction a eu lieu "dans le Comté de Montréal" est une indication suffisante du lieu où l'offense a été commise.

311

Intervention—Inscription.

9. Held, 1st. That where an Intervention, filed under the 92d Section of the Judicature Act, does not disclose on its face any interest or right in the Intervening party, the Court will dismiss it from the record on motion. 2nd. That a new inscription is not necessary, the case being already inscribed, and not having lost its place on the roll.

Seymour vs. St. Julien.

9. Jugé, 1o. Qu'une Intervention produite en vertu de la 92e section de l'Acte de Judicature, qui ne fait pas apparaître de l'intérêt ou droit d'intervention, peut être renvoyée et rejetée du record sur une simple motion. 2o. Qu'il n'est pas besoin d'une nouvelle inscription dans ce cas pour procéder à l'audition de la cause, lorsqu'elle a été suspendue par l'enfilure d'une telle Intervention.

321

Sufficiency of Pleadings.

10. Held 1. That under the 86 and 87 sections of the Statute of the 12th Vic. ch. 38, it is sufficient in any pleading, to allege the facts upon which the party intends to rely, in plain and concise language, to the interpretation of which the rules of construction applicable to such language in the ordinary transactions of life may apply, and that no form of words is necessary to express the same.

10. Jugé, 1. Que sous l'opération des 86 et 87 sections du Statut de la 12 Vic. c. 38, il suffit, dans aucun plaidoyer, d'énoncer les faits sur lesquels une partie entend s'appuyer, en termes clairs et précis, et aux quels s'appliquent les règles d'interprétation applicables aux mêmes termes dans les transactions ordinaires de la vie, sans qu'il soit besoin de formules particulières pour les exprimer.

2. That a party may plead the nullity of the deed on which a demand against him is founded, by exception, and that neither an incidental demand or a direct action is necessary for that purpose.

3. That such nullity can be pleaded at any time by Exception, according to the rule of law, *que temporalia sunt ad agendum, perpetua sunt ad excipiendum*.

Halcro and Deslesderniers.

2. Qu'on peut invoquer la nullité de l'acte sur lequel est basée la demande, par exception, sans recourir à une demande incidente, ou à une demande directe.

3. Que cette nullité peut être opposée par exception, en tout temps, suivant la règle de droit, *que temporalia sunt ad agendum, perpetua sunt ad excipiendum*.

325

11. A contestation raised between two Opposants forms a distinct issue *quoad* such parties.

All documentary evidence, relative to the issues raised by such contestation, must be filed by such Opposants, and it is not sufficient that such evidence be already filed by other parties to the record.

Kelly vs. Fraser.

11. Une contestation liée entre deux Opposants dans une cause est une contestation distincte quant à tels Opposants.

Toute preuve écrite, ayant rapport à telle contestation, doit être produite par les Opposants, et il ne suffit pas que tels documents aient déjà été produits par d'autres parties dans la cause.

368

POSSESSION.

Held, 1. That in cases of sales of waste lands, tradition is necessary to convey the right of property.

2. That when the purchaser by private sale of such lands does not take possession of the same, such lands may be legally seized and sold as belonging to the vendor.

3. That in such case the purchaser becomes seized of such lands, to the exclusion of the purchaser who has neglected to take possession.

4. That a partition among co-heirs, duly homologated, is evidence as against third parties, of the quality assumed by such heirs, and it is not necessary that certificates of baptism and of marriage should be produced.

Mallory and Hart.

Jugé, 1. Que dans le cas de vente privée de terres non défrichées et en bois debout, la tradition est nécessaire pour transmettre la propriété.

2. Qu'à défaut de prise de possession par l'acquéreur par titre privé, ces terres peuvent être légalement saisies et décrétées sur le vendeur.

3. Que le décret saisit l'adjudicataire dans ce cas, au préjudice de l'acquéreur qui n'a pas pris possession de fait.

4. Qu'un partage homologué en justice entre co-héritiers, fait preuve à l'égard de tiers de la qualité de tels héritiers, sans qu'il soit nécessaire de produire les certificats de baptême et de mariage.

345

PRIVILEGE—See MORTGAGE.

PRIVILEGED COSTS—See MORTGAGE, s. 4.

PROMISSORY NOTE.

1. Held, that in the case of protest of a note, dated at Montreal and payable at a Bank in Albany, in the State of New York, a notice of protest mailed by a Notary at Albany, addressed to an endorser at Montreal, (protest being made and notice mailed according to the laws of the State) is not sufficient, the postal arrangements between the two countries at the time, being such, that letters could not pass through the post without pre-payment of postage from Albany to the line.

Notice sent to the endorser, at the place where the note was dated, is sufficient diligence: the place of abode being sufficient indication of the endorser's domicile, to warrant the holder in sending such notice, the endorsement being unrestricted.

Howard vs. Sabourin.

1. Jugé, que dans l'espèce d'un billet daté à Montréal et payable à Albany, dans l'Etat de New York, l'avis de protêt envoyé par la maille à l'endosseur à Montréal (le protêt étant fait et l'avis mis à la poste suivant les lois de l'Etat) n'est pas suffisant, les arrangements entre les deux pays relativement aux malles ne permettant pas le passage de lettres, sans paiement préalable, d'Albany à la ligne entre les deux pays.

L'avis adressé à l'endosseur au lieu où le billet est daté, est une diligence suffisante, telle indication justifiant le porteur, lorsque l'endorsement est sans restriction, de regarder ce lieu comme domicile de l'endosseur.

121

2. Held, that a promissory note, payable on demand, is due from the day of its date, and that prescription runs against it from that time.

Larocque vs. Andres.

2. Jugé, qu'un billet promissoire, payable à demande, est dû du jour de sa date, et que la prescription court contre tel billet de ce jour.

335

RAILROAD.

Held, that where by the charter of a Railroad Company, they are not bound to erect barriers at those points where the line crosses the public road, they are not answerable for injury done to cattle straying on the line from the public road: but that parties allowing their cattle so to stray are answerable to the Railway Company for damage done to the cars, thrown off the track by collision with such cattle.

Jugé, que dans le cas où une compagnie pour la construction d'un Chemin de Fer, n'est pas par sa charte obligée d'ériger des barrières dans les endroits où la ligne traverse un chemin public, telle compagnie n'est pas responsable des injures faites aux animaux errants sur telle ligne: mais que les parties dont les animaux errent ainsi sont responsables envers telle compagnie des dommages qui peuvent en résulter.

Rocheleau vs. The St. Lawrence and Atlantic Railway Company. 337

REGISTRATION—See MORTGAGE.

REGISTRATION OF ACT OF TUTORSHIP.

1. Held, that in an action brought by a Tutor to a Minor, it is essential that the declaration contain an allegation that the appointment of the said Tutor, or a memorial of such appointment, has been enregistered.

Murray vs. Gorman.

1. Jugé, que dans une action portée par un Tuteur à un Mineur, il est essentiel que la déclaration contienne un allégué, que l'acte de tutelle, ou un sommaire d'icelui, a été enregistré.

3

REGISTRATION OF TITLES TO PROPERTY.

2. Held, that it is not necessary to cause registration of old titles to property.

Murphy vs. O'Donovan.

2. Jugé, qu'il n'est pas nécessaire de faire enregistrer les anciens titres de propriété.

333

RES JUDICATA.

Held, that a judgment rendered against a principal debtor upon an issue raised by him, is *res judicata* against a surety, who was not a party to the original cause.

Brush vs. Wilson.

Jugé, qu'un jugement rendu contre un débiteur principal sur une contestation élevée par lui, a force de chose jugée contre la caution, qui n'était pas partie à l'action originaire.

249

SAISIE-ARRÊT.—Attachment.

Held, that according to the provisions of the 12 Vic. cap. 38, sec. 79, a Writ of *saisie-arrêt*, after judgment, may be made returnable in vacation, if it issue in an appealable case.

That it is the duty of the bailiff executing such Writ, to deliver it on or before the return day, either to the attorney or party from whom he received it, or to file it in the Office of the Clerk of the Court into which it is returnable, although he was not specially requested so to do.

That having received such Writ as bailiff to execute the same, he will not be permitted to urge the want of proof, in the record, of his being a bailiff.

That the proof of the amount of the debt due by the *Tiers-saisi* to the Defendant, of the Attachment of it in the hands of such *Tiers-saisi*, and of the payment of such amount to others than the Plaintiff, the Plaintiff's Judgment remaining

Jugé, que d'après les dispositions de la 12 Vict. ch. 38, sec. 79, un Writ de *saisie-arrêt*, après jugement, peut être rapporté en vacance, si tel Writ émane dans une cause appealable.

Qu'il est du devoir de l'huissier de délivrer tel Writ, le ou avant le jour du rapport, soit au procureur ou à la partie qui le lui a remis, ou de l'enfiler au Bureau du Greffier de la Cour dans laquelle il est rapportable, quand même il n'en a pas été spécialement requis.

Qu'ayant reçu tel Writ comme huissier, pour en faire la signification, il ne lui sera pas permis de soutenir qu'il n'y a pas de preuve qu'il soit huissier.

Que la preuve du montant dû par le *Tiers-saisi* au Défendeur, ainsi que de la *saisie* faite entre les mains du *Tiers-saisi*, et du paiement de tel montant à d'autres qu'au Demandeur, le jugement du Demandeur n'étant pas payé, est suffisante

unsatisfied, is sufficient to entitle the Plaintiff to recover damages to the extent of the amount due by such Garnishee, without direct evidence of the Defendant's insolvency.

Lampson vs. Barret.

pour donner au Demandeur le droit de recouvrer des dommages jusqu'au montant dû par tel Tiers-saisi, sans qu'il soit besoin de preuve directe de l'insolvabilité du Défendeur.

77

SAISIE GAGERIE, OF GOODS UPON A WHARF.

The Plaintiff had brought an action against the Defendant for wharf rent, and seized, upon the said wharf, by process of *saisie-gagerie*, a certain quantity of fire bricks, and hearth stones; the Defendant, amongst other things, had pleaded payment; a third party had intervened to claim the said bricks and hearth stones as his property; the Court below had held the plea of payment to be made out, dismissed the Plaintiff's action, and maintained the intervention:—

Held, in appeal, that—1st. the plea of payment was not made out; and 2nd. that the said fire bricks and hearth stones, deposited upon the said wharf and seized upon the Defendant for wharf rent, were legally seized, under process of *saisie-gagerie*, to secure a lawful demand for rent in arrear, for the use of said wharf; and that the said bricks and hearth stones were liable and subject by law to the privilege of landlord *super invectis et illatis*, as goods and merchandize stored, kept and placed, for deposit and sale, upon the said wharf, by the agent and factor of the owner, who, under the statute 10th and 11th Vic. cap. 10, had power to pledge the goods of his consignor: Consequently, the judgments of the Court below, reversed, the Plaintiff's action maintained, the seizure declared good and valid, and the intervention dismissed.

Jones and Anderson.

Le Demandeur en cette cause avait poursuivi le Défendeur pour le loyer d'un quai, et saisi-gagé, sur le dit quai, une certaine quantité de briques à feu et de foyers; le Défendeur avait, entre autres choses, plaidé paiement; un tiers était intervenu dans la cause pour réclamer les dites briques et les dits foyers comme sa propriété; la Cour Inférieure avait été d'opinion, que le paiement était prouvé, avait débouté l'action du Demandeur, et maintenu l'intervention:—

Jugé, en appel—1. Qu'il n'y avait pas preuve du paiement; 2. Que les briques et foyers, déposés sur le dit quai et saisis sur le Défendeur pour le loyer d'icelui, avaient été légalement saisis-gagés, pour garantir le paiement des loyers dus pour l'usage du dit quai; et que les briques et foyers étaient sujets par la loi au privilège du locateur, *super invectis et illatis*, comme marchandises, emmagasinées, déposées et mises en vente sur le quai, par l'agent et facteur du propriétaire, lequel en vertu du statut de la 10e et 11e Vic. chap. 10, avait le pouvoir de mettre en gage les effets de son commettant: En conséquence, les jugements rendus en Cour inférieure infirmés, l'action du Demandeur maintenue, la saisie-gagerie déclarée bonne et valable, et l'intervention déboutée.

154

SALE—REDUCTION OF PRICE.

The sale of an immoveable by the Sheriff, which does not contain the extent of ground described, gives

Le défaut de contenance, dans un immeuble vendu par décret, donne droit à l'adjudicataire de demander

the purchaser the right of demanding a reduction of the price proportionate to the extent of ground deficient.

Paradis vs. Allain.

diminution du prix dans les proportions du prix d'achat et du déficit.

194

SEIGNIORIAL RIGHTS.

Held, that the *arrêt* of the King of France, of the 6th July, 1714, can only be made to apply to cases where the seignior has refused to grant his unconceded lands; that the *arrêt* of the 17th March, 1732, merely enjoins the clearing of forest lands, forbidding the sale of such lands; but that these two *arrêts* afford no remedy to a *censitaire* who complains that the rate of *rentes* is too high; that there is no positive law limiting the rate of *cens et rentes*; that a deed of concession imposing one *sol* of *cens et rentes* and seven *sols* of *rente constituée*, is not a deed of sale, and is not consequently void or voidable; and that in the case submitted, the Court has no power to reduce the rate of *cens et rentes*.

Langlois vs. Martel.

Jugé, que l'*arrêt* du Roi de France, du 6 juillet, 1711, n'est applicable qu'au cas où un seigneur aurait refusé de concéder; que celui du 15 mars, 1732, ordonne uniquement le défrichement des terres, et prohibe la vente de celles en bois debout; mais que ces deux *arrêts* ne peuvent nullement s'appliquer au cas où un censitaire se plaint du taux des rentes qu'on lui a imposées; qu'il n'y a point de lois positives qui fixent le taux des rentes; qu'un contrat de concession qui impose un *sol* de *cens et rentes*, et sept *sols* de *rente constituée*, n'est pas une vente, et conséquemment n'est pas nul, ni annulable; que dans le cas particulier la Cour n'a pas le pouvoir de diminuer le taux des rentes.

36

SEIZURE.

1. Held, that upon the seizure of moveables under a Writ of Fieri Facias, no demand of payment is necessary.

Lee vs. Lampson.

1. Jugé, que dans la saisie-exécution de meubles, le commandement de payer n'est pas nécessaire.

148

SEIZURE. FORMALITIES OF.

2. Held, that upon seizure of real estate, the absence of a witness to the seizure, *recors*, the want of an election of domicile by the party seizing and by the bailiff, the omission to state whether the seizure was effected before or after twelve o'clock, and that a demand of payment was made, when such execution is directed against the moveables only, are not sufficient grounds to impugn the validity of such seizure.

2. Jugé, que sur saisie réelle, l'absence de *recors*, l'élection de domicile du saisissant et de l'huissier, de mention de l'avant ou de l'après midi, et du commandement de payer, lorsqu'il a eu lieu sur exécution contre les meubles, n'est pas cause de nullité.

That the Return of the Sheriff that the advertisements and publications of the sale have been made, is conclusive until such return is declared false.

That a party against whom execution has issued, and who has failed to make opposition within the period prescribed by the 41 Geo. III., cap. 7, sec. 11, is for ever precluded from the right of availing himself of any irregularities in the seizure of his immoveables and of the proceedings thereon.

Boyer vs. Slown.

Que le certificat du Shérif que les annonces et publications ont été faites, fait foi jusqu'à ce que tel certificat ait été déclaré faux.

Que faute de s'être opposé dans le temps fixé par le Statut 41 Geo. 3, ch. 7, sect. 11, le saisi est pour toujours forcé du droit d'invoquer les nullités de la saisie de ses immeubles, ainsi que des procédés qui y ont rapport.

53

SHERIFF—LIABILITY OF, TO PRINTERS.

In an action by the Printer of the *Quebec Gazette*, published by authority, against the Sheriff, for the price of advertisements of legal sales inserted in the said *Gazette*, held, that the latter is alone liable, and that there is no privity of contract between the Printer and the Plaintiffs at whose suit the properties advertised are brought to sale.

Stevenson vs. Boston.

Dans une action intentée par l'Imprimeur de la *Gazette de Québec* publiée par autorité, contre le Shérif, pour le coût des avertissements de décrets publiés dans la dite *Gazette*, jugé, que le Shérif seul est responsable, et qu'il n'existe aucun contrat entre l'Imprimeur et les parties à la poursuite desquelles les immeubles saisis sont décrétés.

17

SHERIFF—See CONTRAINT.

STATUTE.

EFFECT OF ERROR IN A STATUTE.

Held, that a typographical or clerical error in the english text of a Statute, by the insertion of the word "these" instead of the word "third," cannot be corrected by a reference to the french text, in which no such error occurs, and that the Court will not presume what meaning the Legislature intended, but will take the text as it finds it.

Archambault vs Roy dit Picotte and Poirier.

Jugé, qu'une erreur cléricale ou typographique dans le texte anglais d'un Statut, par la substitution du mot "these" pour le mot "third," ne peut être corrigée en référant à la version française, dans laquelle l'erreur n'existe pas, et que la Cour ne présumera pas quelle a été l'intention de la Législature, mais prendra le texte tel qu'il se trouve.

25

SUBROGATION.

Held, that a deed, by which it is declared that the payment made by a debtor, is so made with the monies of a third party, borrowed upon the condition of subrogating such party to the rights of the creditor, and that such declaration is made for the purpose of effecting such subrogation (such third party not being present at the execution of the deed,) does not effect a subrogation in favor of such party, by reason of want of acceptance on his part, nor does the stipulation to that effect, with the debtor, effect such subrogation, by reason of the absence of an authentic instrument, as evidence of the loan and of its object, at a period anterior to the payment; also, that the allegation, in an opposition, of a parol contract, anterior to the payment, that the monies were loaned to the debtor, upon condition that the lender should be subrogated to the rights of the creditor, cannot be taken as admitted, although such opposition is not contested, upon the principle, that a contract of such a character could only be proved by an authentic instrument, which would render certain the period at which the loan was made; and lastly, that the acceptance, subsequently made by the lender, of the assignment of the rights of the original creditor, is inoperative to effect the subrogation, because the original debt was completely extinguished at the time of the payment.

Filmer and Bell.

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SURETY.

Held, that a bond conditional upon the due fulfilment of the duties of an officer in a Bank, is made void by the reduction of the salary stipulated, in favor of such officer, in and by the deed containing such bond, and that such reduction, without the consent of the sureties, has the effect of a novation.

The City Bank vs. Brown.

Jugé, qu'un acte, dans lequel le débiteur déclare payer des deniers d'un tiers, tels deniers empruntés à la condition de fournir à ce tiers une subrogation aux droits du créancier, et que cette déclaration est faite aux fins d'opérer telle subrogation, (ce tiers n'étant pas présent à l'acte,) n'opère pas une subrogation par le créancier, par défaut d'acceptation de la part du tiers, et ne peut non plus opérer une subrogation par la convention avec le débiteur, par défaut d'un acte authentique, constatant le prêt et la destination de tel prêt, antérieur au paiement; encore, que l'allégué, dans une opposition, d'une convention verbale antérieure au paiement, que les deniers ont été prêtés au débiteur par un tiers, à la condition de lui obtenir la subrogation aux droits du créancier, ne peut être considéré comme admis, quoique telle opposition ne soit pas contestée, sur le principe qu'il faut preuve de telle convention par acte authentique qui puisse rendre certaine la date du prêt; et enfin, que l'acceptation, faite après coup par le prêteur, de la cession des droits du créancier, est de nul effet pour lui obtenir la subrogation, sur le principe que la dette a été complètement éteinte à l'instant du paiement.

Jugé, que le cautionnement pour l'exécution des devoirs d'un officier de Banque, est mis au néant par la réduction du salaire stipulé en faveur de cet officier, dans l'acte qui contenait tel cautionnement, et que cette réduction de salaire, sans la participation des cautions, a l'effet d'une novation.

246

TAVERN LICENSES, GRANTING OF

The Mayor and Councillors of the City of Quebec, under the 14th and 15th Vict., Cap. 100, sects. 5th and 6th, have a discretionary power as to the confirming or refusing to confirm certificates for Tavern licenses; and, in the exercise of the discretionary power so vested in them, they are not liable to be controlled by the Superior Court, or the Judges of that Court in vacation.

Le Maire et les Conseillers de la Cité de Québec, en vertu de la 14e et 15e Vic. chap. 100, secs. 5ième et 6ième, ont un pouvoir discrétionnaire quant à la confirmation ou au refus de confirmer les certificats pour licences d'auberge; et, dans l'exercice du pouvoir discrétionnaire qui leur est confié, ils ne sont pas sujets au contrôle de la Cour Supérieure ou des juges de cette Cour en vacance.

Lawlor—Ex parte.

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TAX FOR LAW REPORTS, See ADVOCATES.

TESTAMENTARY EXECUTOR, REMOVAL OF.

Held, 1st. That where an Executor, whose powers have been extended by a Testator, beyond a year and a day, has become insolvent, and is making away with the estate, the Court will interfere to deprive him of the control of the property, and oust him from his office: and 2d. That the Court has no power to appoint a sequestrator.

Jugé, 1. Qu'un Exécuteur testamentaire, dont les pouvoirs sont prolongés au-delà de l'an et jour, qui est devenu insolvable, et qui dissipe les biens de la succession, peut être déchu par la Cour de l'exécution testamentaire et de l'administration des biens délaissés: et 2d. Que la Cour dans ce cas n'a pas le pouvoir de nommer un séquestre.

Mackintosh vs. Dease.

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TIERS-DÉTENTEUR.

The *Tiers détenteur* is never presumed to bind himself personally.

L'on ne présume jamais que le tiers détenteur s'oblige personnellement.

La Banque du Peuple vs. Gingras.

243

VARIANCE IN A WRIT.

Held, 1. That a variance between the original Writ of Summons and a copy is a nullity which cannot be amended without the consent of the Defendant; and 2. that in such case, it is not necessary to inscribe *en faux* against the bailiff's return.

Jugé, 1. Que la non conformité de la copie avec l'original d'un Writ de Sommation est une nullité qui ne peut être amendée sans le consentement du Défendeur; et 2. Qu'il n'est pas besoin de l'inscription de Faux à l'encontre du rapport de l'huissier en pareil cas.

Thérberge vs. Pattenau.

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WILD LANDS—See POSSESSION.

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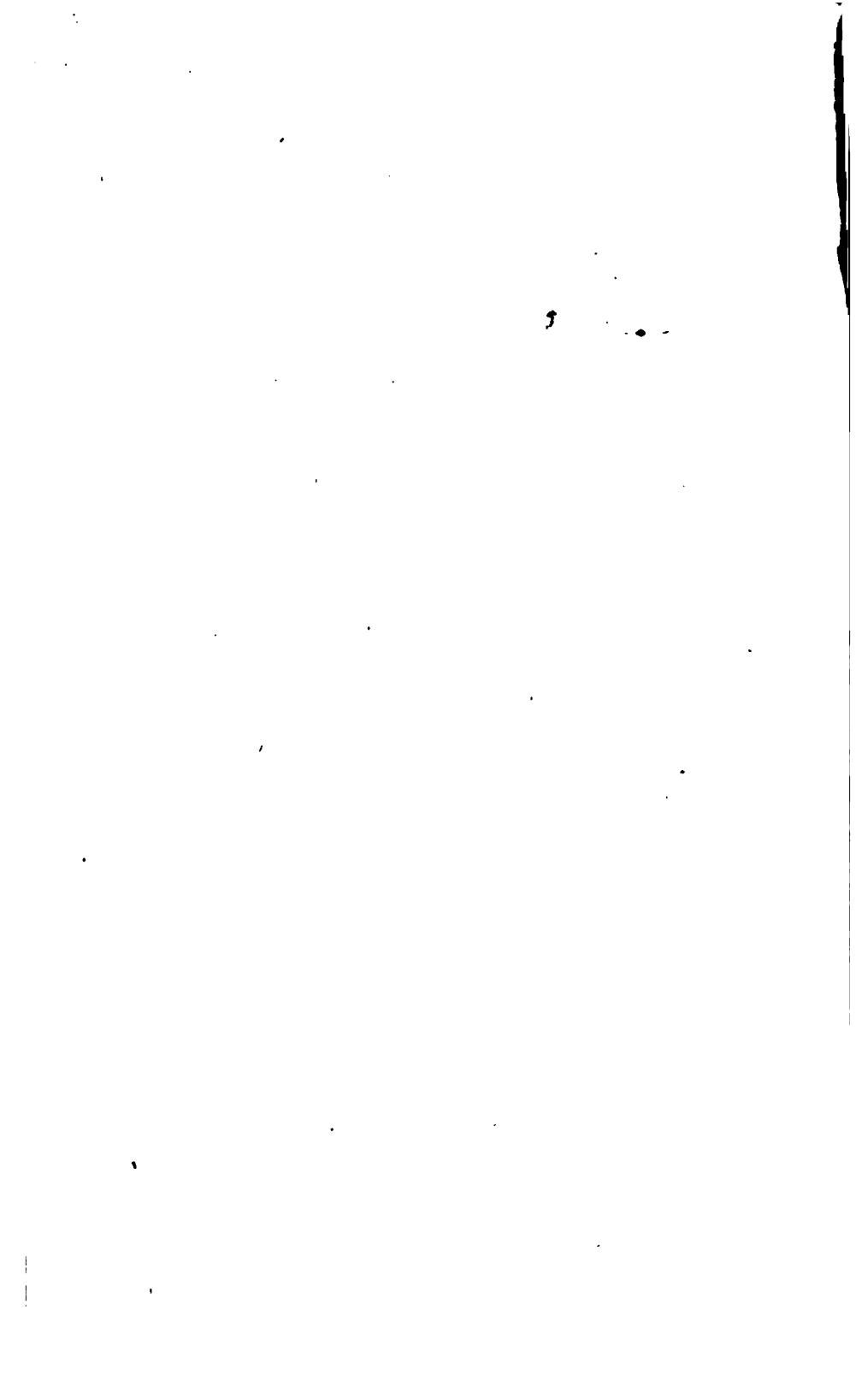
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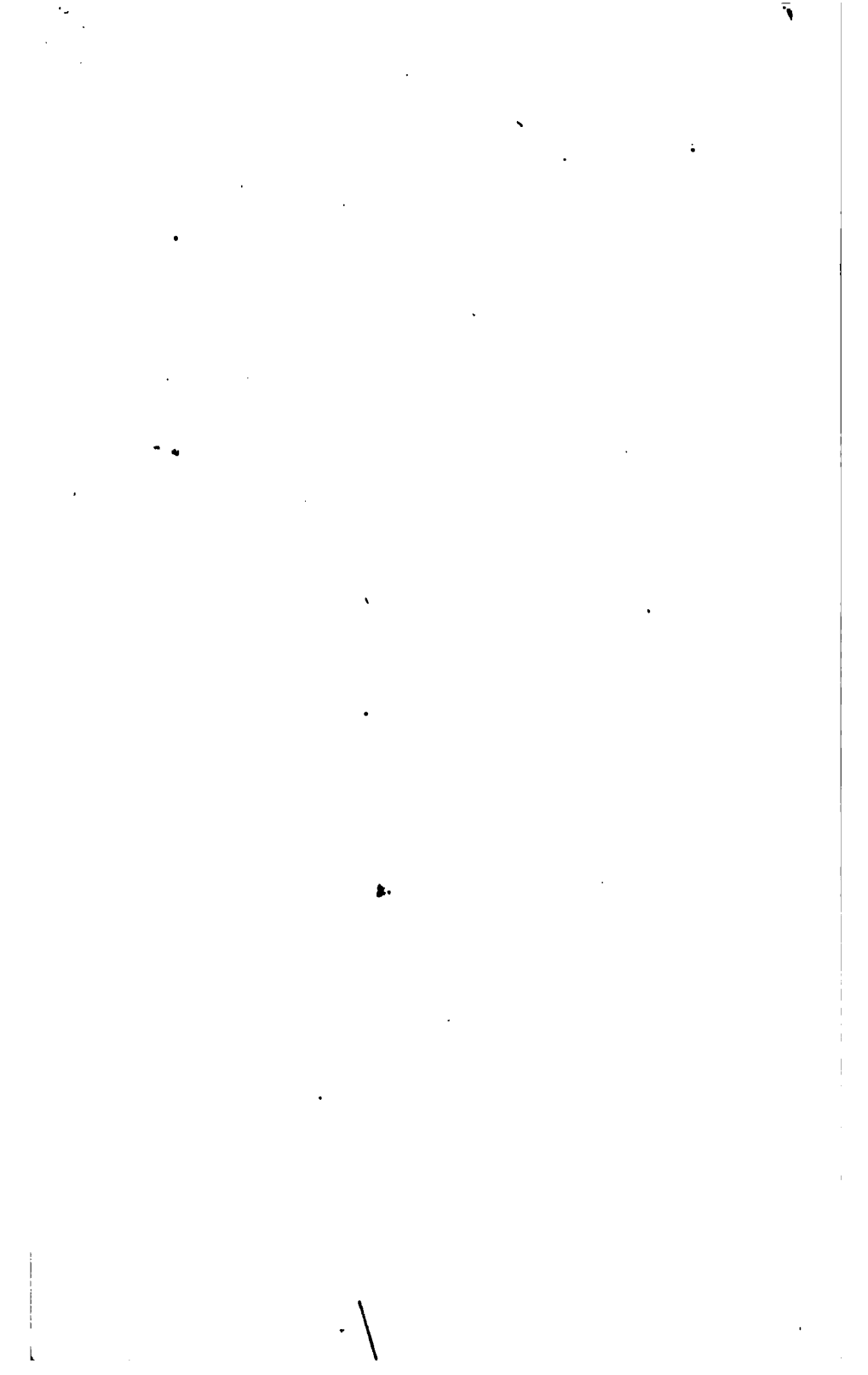


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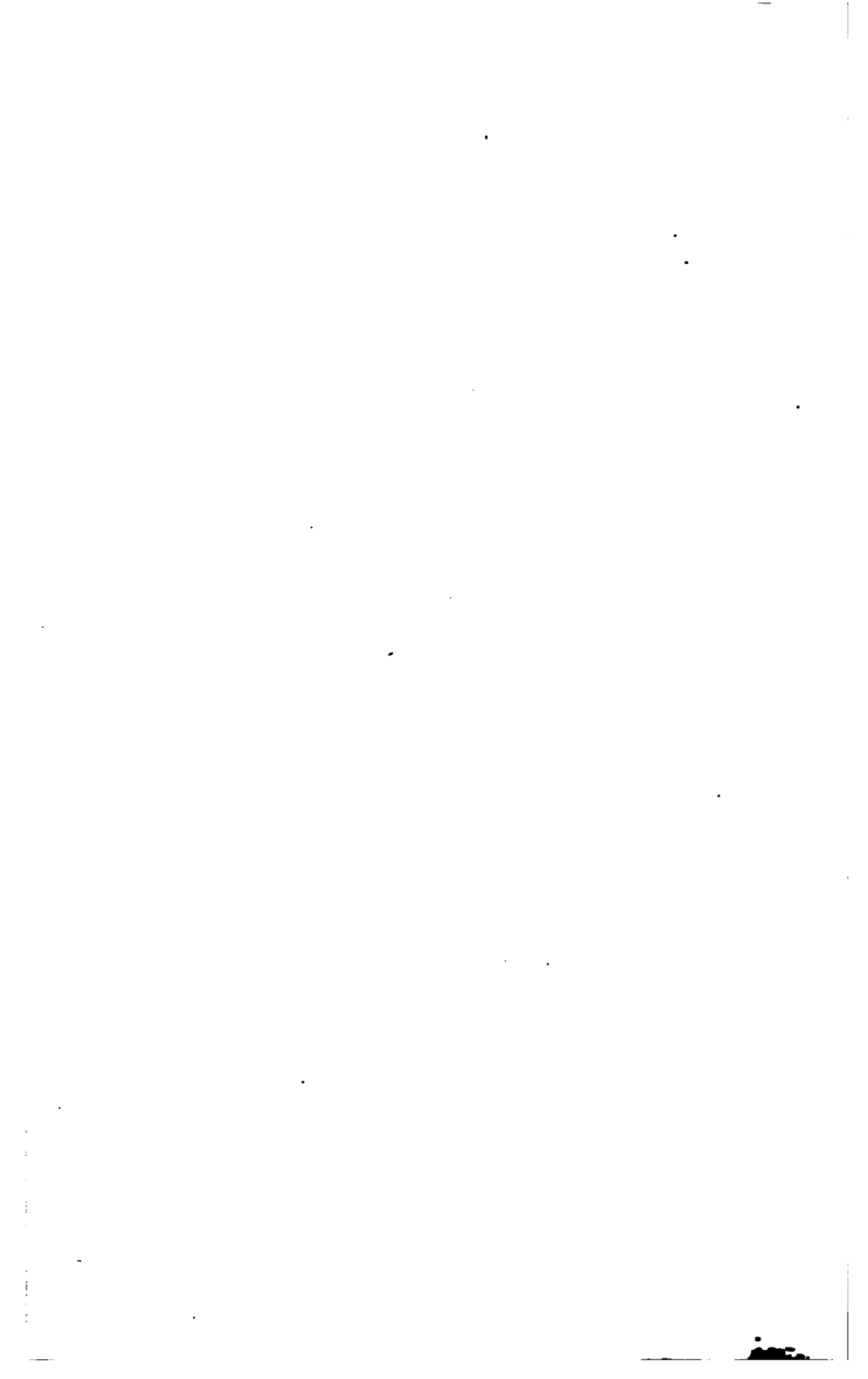
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